Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

ROY K. PRESTON,

Petitioner,

v.

GEORGIA POWER COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether inchoate interests may amount to property protected by due process.

2. Whether inchoate rights of action in tort may amount to property protected by due process.

3. Whether the Constitution's due process clauses may require notice of physical conditions, imperceptible to the public, which trigger requirements to act to protect a future claim.

4. Whether the Georgia High-voltage Safety Act, which denies tort recovery against a public utility absent report from the public of intended work near high-tension lines, yet requires no prior notice to the public that a line is dedicated to high-tension current, violates due process.

PARTIES BELOW

In addition to Petitioner and Respondent Georgia Power Company, two other parties appeared in the Georgia Court of Appeals, whose judgment is sought to be reviewed here. Ashland Chemical Company was an appellee (concerning issues different from those affecting Georgia Power Company). In a companion appeal heard and decided together with this one, Insurance Company of North America was an appellant against these same two appellees.

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OPINIONS BELOW

The opinion of the Georgia Court of Appeals (App., *infra*, 1a-20a), is reported at 227 Ga.App. 449, 489 S.E.2d 573 (1997). The following orders and dispositions are not reported: the Georgia Supreme Court's denial of certiorari (App., *infra*, 21a); the Georgia Supreme Court's denial of reconsideration (App., *infra*, 22a); the final order of the trial court granting summary judgment, from which this appeal was taken (App., *infra*, 23a-35a); the earlier order of the trial court denying Petitioner's motion to strike Georgia Power Company's defenses (App., *infra*, 36a-41a); the order of the trial court certifying this preliminary order for immediate appeal (App., *infra*, 46a); the Georgia Supreme Court's denial of interlocutory review (App., *infra*, 47a); and the Georgia Supreme Court's order transferring Petitioner's appeal from summary judgment to the Georgia Court of Appeals (App., *infra*, 52a).

JURISDICTION

The Supreme Court of Georgia, that state's highest court, denied certiorari on February 20, 1998. (App., *infra*, 21a) That court denied a motion to reconsider on April 1, 1998. (App., *infra*, 22a) This Court has jurisdiction to review the judgment of the Court of Appeals of Georgia pursuant to 28 U.S.C. § 1257(a).

Petitioner notes that 28 U.S.C. § 2403(b) may apply to this proceeding. The State of Georgia has received no previous notice. The notifications required by this Court's

Rule 29.4 have been effected by service of this Petition upon the Attorney General of the State of Georgia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

> " . . . nor shall any State deprive any person of . . . property, without due process of law."

Relevant provisions of the Georgia High-voltage Safety Act (the "Act"), O.C.G.A. §§ 46-3-30 *ff.*, are set out in a statutory appendix to this Petition (App., *infra*, 55a-59a).

In summary, the Act requires at least 72 hours' advance report of intended work under or near a high tension line, to a "utilities protection center." O.C.G.A. § 46-3-34(b). The Act imposes the advance reporting requirement upon both a contractor or other employer, and an individual employee at work. O.C.G.A. § 46-3-32(3).

Among other penalties, the statute traditionally has made failure to report work a ground for indemnifying the utility for any resulting tort claims. O.C.G.A. § 46-3-40(b). Until 1992, the utility remained subject to tort liability despite lack of advance report of the work, if the utility was negligent in maintaining the line. *Malvarez v. Georgia Power Co.*, 250 Ga. 568, 300 S.E.2d 145 (1983). In 1992, however, the Georgia General Assembly added the following penalty: "The owner or operator of high-voltage lines shall not be liable for damage or loss to person

or property resulting from work within ten feet of high-voltage lines unless notice has been given. . . . " O.C.G.A. § 46-3-39(a). The Act defines a high-voltage line as one carrying more than 750 volts. O.C.G.A. § 46-3-32(1). The Act does not require the utility to post notice that any given line carries more than 750 volts.

STATEMENT OF THE CASE

A. Petitioner's Allegations and Claims for Relief.

Petitioner Preston lost both feet, his left hand and the use of his right hand when he was severely shocked by current flowing through high-tension lines operated by Respondent Georgia Power Company ("Georgia Power"). Preston worked for a temporary labor service, and was assigned to various needed manual labor with Ashland Chemical Company. Ashland operated chemical-laden railroad cars on a spur line which paralleled Georgia Power's high-tension wires.

The interior of Ashland's cars regularly became fouled with chemical deposits. Ashland formerly sent workers into such cars to scrape down the residue. When OSHA determined this was a health hazard, Ashland developed the alternative of scrapers attached to very long poles.

One day in May of 1993, Petitioner Preston was assigned for the first time to cleaning chemical-encrusted cars on the railroad siding paralleling Respondent's high-voltage line. He was given no instruction on how to clean in order to avoid danger. The handle of Preston's

"spader" touched Georgia Power's high-tension line as he worked.

As electrical engineer, appearing as an expert witness for Petitioner, deposed that Georgia Power's high-tension line was closer to the car Preston was cleaning than is permitted by the National Electrical Safety Code (an industry-wide standard adopted by the Institute of Electrical and Electronics Engineers, Inc.) and other relevant safety standards.

B. Proceedings Below and Petitioner's Presentation of a Federal Question.

Petitioner presented his federal due process claims to the highest court in Georgia, the Supreme Court. That Court's denial of certiorari amounts to a denial of his constitutional claims. In fact, Petitioner brought those claims to the Supreme Court of Georgia not once but thrice.

The Supreme Court of Georgia, acting as a whole, has now certified that Petitioner presented his federal due process issues to that court, and that it decided those issues against him. (App., *infra*, 62a) That court's order satisfies this Court's requirements for such a certificate, by verifying that Petitioner raised his issues in the Supreme Court of Georgia, and that they were resolved against him. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 22 (1974). Petitioner will forward a certified copy of that court's Certificate to the Clerk of this Court.

Petitioner requested the Certificate because the basis for the Georgia Supreme Court's actions is not explicit,

and even the Georgia Court of Appeals did not address directly the constitutional issue raised here. Lest there be any "remaining doubts," *id.* at 23 n.2, Petitioner will describe the procedures below so that this Court may form its own judgment as to his presentation of the issues, and their resolution against him.

Petitioner sued Georgia Power and also Ashland (which was eventually treated as a statutory employer, exempted from tort liability). He alleged that Georgia Power was negligent when it placed or maintained a dangerous instrumentality, a high tension electric line, too close to the railroad siding where he worked.

Respondent's answer claimed a defense under Georgia's High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq. That statute requires advance report to Georgia Power of any work within ten feet of a high-tension line (defined as a wire carrying more than 750 volts), absent which the utility will escape tort liability. Petitioner filed h prompt motion to strike this defense, showing that the statute violated federal constitutional guarantees. (App., *infra*, 42a-43a) In particular, his brief argued that the reporting requirement imposed on him violated due process, in that he had no prior notice that the wire near which he was assigned work was a "high-voltage line." (App., *infra*, 44a-45a)

The trial court rejected Petitioner's constitutional challenge and denied his motion to strike (App., *infra*, 36a-41a), but granted a certificate of immediate review. (App., *infra*, 46a) The Supreme Court of Georgia denied Petitioner's ensuing application for interlocutory review. (App., *infra*, 47a)

Georgia Power later moved for summary judgment, asserting only the bar of the High-voltage Safety Act. Petitioner's response showed yet again the statute's unconstitutionality. The trial court granted summary judgment on a new and different ground, ruling that nothing in the record supported Petitioner's burden to show proximate causation. (App., *infra*, 23a-35a)

Recognizing the ever-present potential for appellate affirmance of summary judgment on an alternative ground (the High-voltage Safety Act), Petitioner appealed to the Supreme Court of Georgia, which has exclusive jurisdiction over appeals raising constitutional issues. Ga. Const. 1983, Art. 6, Sec. 6, Par. 2(1). Petitioner asserted jurisdiction in the Supreme Court because a ruling based on the Act necessarily would draw into question its constitutionality. Preston accordingly enumerated both the grant of summary judgment to Respondent and the denial of his motion to strike Georgia Power's defense as error (App., *infra*, 51a), and briefed the federal constitutional issues in the Georgia Supreme Court (App., *infra*, 48a-50a), as did Georgia Power.

The Supreme Court nonetheless transferred Petitioner's appeal to the Court of Appeals, after determining that "the issue on which the trial court granted summary judgment in these cases does not fall within the jurisdiction of this Court" (App., *infra*, 52a), apparently because the trial court's stated (proximate causation) basis for summary judgment did not implicate Petitioner's constitutional due process issues. Georgia Power nevertheless continued to assert the High-voltage Safety Act as an alternative ground for affirming summary judgment.

The Court of Appeals declined to adopt the trial court's proximate cause reasoning. Instead, that court affirmed only on the alternative grounds.[1] It ruled – as Georgia Power had insisted ever since issue was first joined in this case – that Preston's claims were barred by the High-voltage Safety Act. *Preston v. Georgia Power Co. et al.*, 227 Ga.App. 449, 489 S.E.2d 573 (1997) (App., *infra*, 1a-20a). At the same time, however, the Court of Appeals declined to rule on Preston's constantly-pressed constitutional challenge. That court held that it lacked subject matter jurisdiction to pass on constitutional issues, but also "noted" that the challenge was somehow "irrelevant." (App., *infra*, 8a) (Petitioner will show in his Reasons for Granting the Writ, *infra*, that the due process issues are anything but irrelevant.)

Preston sought constitutional review in the Supreme Court of Georgia for a third time, this time on certiorari. His Petition made clear that the Georgia Court of Appeals had invoked the bar of the High-voltage Safety Act, that that Act was unconstitutional, that its unconstitutional features were in no way "irrelevant," and that he sought the Georgia Supreme Court's aid in deciding the constitutional issues. (App., *infra*, 53a-54a) Georgia Power likewise briefed the constitutional issues.

The Supreme Court of Georgia denied certiorari on February 28, 1998, in a one-paragraph order expressing no reasons for its denial. (App., *infra*, 21a) Petitioner moved for reconsideration of the denial of certiorari. That

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[1] Thus, for purposes of this Petition, the record as well as Preston's allegations supports each element of his tort claim, including injury, negligence and proximate causation.

court denied Petitioner's motion to reconsider by order of April 1, 1998. (App., *infra*, 22a)

This process, in addition to that court's Certificate, shows that the Georgia Supreme Court necessarily considered and rejected Petitioner's constitutional arguments, even though that court never addressed them explicitly. The issues were squarely presented to the Georgia Supreme Court by Preston's Application for interlocutory review, by his appeal brief (before transfer to the Georgia Court of Appeals) and by his Petition for Certiorari. That Petition culminated a long process in which Georgia Power continually asserted the statutory bar of the High-voltage Safety Act, and Preston just as assiduously asserted that Georgia Power could not invoke the Act to bar his claim because the Act was unconstitutional. Thus the history of this action is quite enough to show that the Supreme Court of Georgia considered the due process issues and decided them against Petitioner.

Uniquely in this case, another powerful factor shows that the Georgia Supreme Court necessarily was presented with and rejected Petitioner's constitutional concerns. On February 23, within a week of denying Preston's Petition for Certiorari, that court also decided *Santana v. Georgia Power Co.*, 269 Ga. 127, ___ S.E.2d ___ (1998). That decision resolved constitutional issues closely parallel to those raised by Preston. (See excerpt, App., *infra*, 60a-61a) (Preston also filed an amicus brief supporting Santana's constitutional challenges to the High-voltage Safety Act.)

Moreover, the timing of the two dispositions suggests that the decision in *Santana* was the reason for denial of certiorari in Preston's case. The Georgia Supreme Court resolved substantially similar issues, virtually simultaneously with its disposition of this case, in an appeal in which Preston participated (albeit not as a party). Having resolved the issues for Santana, the court apparently deemed that it had resolved them for Preston as well. (The court's Certificate of presentation and decision in this case, App., *infra*, 62a, expressly recites *Santana*.)

Thus the Georgia Supreme Court has certified that Petitioner raised and it rejected the due process issues here presented, and a review of the progress of this case shows the same.

REASONS FOR GRANTING THE WRIT

This Court should grant review for two reasons. First, this case raises substantial issues, unresolved in this Court, as to both the scope of protected "property" for due process purposes and the scope of due process notice rights. Second, Petitioner's loss of his potential tort claim, for lack of notice of imperceptible high voltage current which triggered statutory responsibilities on his part, raises significant practical concerns for this and many other cases.

Petitioner was deprived of the opportunity to pursue any tort remedy because he was not informed that the wire around which he worked was a high tension wire. There was no way he could know what current the wire carried by looking at it; he needed to be told. Reasonable

public notice was easily afforded; all the statute had to say was that utilities should post high-voltage notices on poles that support high tension lines. Yet the Georgia General Assembly omitted any such requirement, while requiring Preston nevertheless to report his work in order to protect his rights. Thus the immediate issue is whether due process may require notice of imperceptible facts whose existence demands action in order to protect a potential future claim.

Petitioner freely acknowledges that the prior decisions of this Court do not go far enough to require notice in this situation. The gaps between those prior opinions and this case are an important reason why this Court should grant certiorari.

I. THIS CASE POSES SIGNIFICANT UNRESOLVED ISSUES AS TO THE SCOPE OF PROPERTY INTERESTS AND OF DUE PROCESS NOTICE.

A. This Case Poses Significant Issues as to the Scope of "Property Interests."

1. This Court Has Not Resolved Whether Inchoate Interests Are Protected.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court declared in obiter dicta: "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Id.* at 576. These dicta from *Roth* imply that only persons with present interests in property may assert due process rights. Under this approach, a person who claims a protected stake in a

benefit, but lacks a present interest, would lack a property right. Yet other portions of the *Roth* opinion, *id.* at 577, and other decisions of this Court challenge the conclusion implicit in the quoted *Roth* dicta. This Petition asks whether due process should not extend to certain interests not yet acquired.

This Court's older decisions appear to find that applicants for government grants, licenses or other privileges have constitutionally protected property interests, specifically in applications for professional licensing. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 102 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *Goldsmith v. United States Bd. of Tax App.*, 270 U.S. 117, 123 (1926). Similarly, this Court has held that due process may protect a parole applicant. *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (liberty interest). Yet in more recent cases, this Court has characterized as undecided the question whether applicants for government grants have a protected stake in their applications. *Lyng v. Payne*, 476 U.S. 926, 942 (1986); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985); see also *Gregory v. Pittsfield*, 470 U.S. 1018, 1021 (1985) (O'Connor, J.); *Peer v. Griffeth*, 445 U.S. 970, 970-71 (1980) (Rehnquist, J.).

Meanwhile, the lower courts almost universally hold that applicants may have a protected stake, so long as eligibility follows as an inexorable result from satisfaction of articulated rules. An excellent catalogue of decisions, not reproduced here in the interest of time and space, is found in *Mallette v. County Employees' Retirement Sys. II*, 91 F.3d 630, 638-39 (4th Cir. 1996).

This Court should grant certiorari and confirm the many decisions which hold that no present interest in a benefit is required, to assert a constitutionally protected property interest.

2. This Court Should Decide If Unmaterialized Tort Claims Are Protected.

This Court's decision unmistakably protect personal injury claims as property, once all their elements have arisen. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (disability discrimination claim). Preston's claim was incomplete, however, because he had not been injured at the time protective notice to him was necessary in order to protect his rights. Thus this case poses the important question whether a property interest may arise from a tort claim which is as yet unrealized. (This case differs from the benefit-application cases as well, since in those cases all facts supporting eligibility normally will exist at the time of application.)

The Court should grant review to decide whether these are distinctions without a difference. Petitioner lost his tort claim and therefore his entire future remedial interest. It matters not whether his claim was fully matured at the time he was injured and shortly before, when he was statutorily required to report in order to protect his claim. Regardless of the timing, he has lost his remedy for lack of notice which would have apprised him of the necessity for action. Regardless of the sequence, Preston's future stake in a tort remedy should prompt this Court to find a property interest.

B. This Case Poses Important Issues as to When Due Process Requires Notice.

This Court has stated in dicta that the reason for requiring notice is to permit preparation for an impending hearing. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). Thus the dicta from *Craft* suggest that due process notice serves only purposes related to an impending or available hearing.[2] Comparable dicta in *Logan v. Zimmerman Brush Co.*, however, open up the possibility that due process notice may serve much broader purposes, starting well before a hearing is in the picture: "[T]he Due Process Clauses protect civil litigants who seek recourse in the courts . . . as plaintiffs attempting to redress grievances." 455 U.S. at 429. Thus where appropriate, due process might provide procedural protections well before a claim materializes. Due process, far from being limited to the context of actual or currently exercisable hearings, should protect claims procedurally over the long term.

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[2] Consistent with these dicta, this Court's opinions thus far appear to require due process notice in the form of (1) advice of any official threat to existing property interests, *Mullane v. Central Hanover Bk. & Tr. Co.*, 339 U.S. 306 (1950); (2) minimally necessary information as to what procedural steps the notice recipient may or must utilize to protect those interests, and how, *Craft*, 436 U.S. at 14-15; and (3) in case of a proposed deprivation, a statement of reason(s), *Goss v. Lopez*, 419 U.S. 565, 580 (1975). Some of the lower courts have added, where appropriate, (4) advisories as to the most important substantive rights the notice recipient has available in order to protect those interests, see, *e.g.*, *Finberg v. Sullivan*, 634 F.2d 50, 61-62 (3d Cir. 1980) (en banc). This case asks whether due process occasionally may require a different sort of notice.

The procedural demands of our constitution are not fixed and immutable; "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The extent of due process procedures depends upon:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). This Petition asks whether due process notice requirements may flex to protect future interests in property, without regard to whether any hearing is either pending or subject to immediate demand.

Applying the *Mathews v. Eldridge* factors, this Court should require notice. Petitioner's lack of notice prior to his injury is as important as lack of notice later, in the context of any hearing or prospective hearing. Because Preston was not informed that the wire near which he worked was a high voltage line, he did not know he had to report his work. Because he did not report his work, he lost any tort claim.

The risk of erroneous deprivation is palpable. The Georgia Court of Appeals made clear the value of notice to workers like Preston, in a similar case: "It is a matter of common knowledge that a great many wires used, for

instance, in telephonic communication are not charged with electric current of [significant] voltage. . . . Merely seeing the wires strung over the property would not put the plaintiff on notice of a dangerous condition." *Lamar Elec. Mem. Corp. v. Carroll*, 89 Ga.App. 440, 454, 79 S.E.2d 832, 841 (1953).

Notice was easily feasible. All Petitioner had to do was post "high-voltage" tags on poles supporting lines carrying high-voltage current. All the statute had to do was require such notice. California has shown the way. That state – which does not even have a High-voltage Safety Act – requires electric utilities to give public notice of high tension wires. The utility shall either used color-coded paint or attach signs saying "high voltage." Cal. Pub. Util. Code § 8029 (West). Given the consequences in Georgia of losing his tort claim, Petitioner should have been afforded such notice as a matter of due process.

Finally, for clarity's sake, Petitioner distinguishes two superficially similar yet quite different potential due process challenges which he does not assert. First, he does not claim that the act is vague, for failure to afford notice of its substantive requirements. *Cf. Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Preston protests lack of notice to him of physical conditions requiring him to act.

Moreover, Petitioner does not seek to roll back the terms of the Georgia High-voltage Safety Act to those in effect prior to 1992. This Court has held that, consistent with due process, "the State remains free to create substantive defenses or immunities for use in adjudication – or to eliminate its statutorily created causes of action altogether." *Logan v. Zimmerman Brush Co.*, 455 U.S. at

432. Despite this power to abolish claims, the state may not impose unreasonable procedural hurdles. *Id.* at 433. Petitioner does not contest adoption of the restrictive 1992 amendments. He protests only the omission of appropriate notice protections.

This Court should grant certiorari to consider the scope of required due process notice.

C. Respondent's Arguments Present No Reason To Deny Certiorari.

Respondent undoubtedly will advance two principal arguments in an attempt to suggest that this case does not present significant due process issues, and does not deserve this Court's attention. First, Georgia Power argues that this statute on its face gives adequate notice of Petitioner's duty to report intended work (and that all citizens are charged with knowledge of the law and presumed to know the law). But those arguments do not avoid the due process issues. A statute standing alone is constitutionally adequate notice only as to its legal prescription and any facts it conveys. Where a statute or regulation on its face is asserted as the basis for due process compliance, the test is whether its publication provides sufficient facts to enable the reader to determine his or her rights or duties. See, *e.g.*, *Lyng v. Payne*, 476 U.S. at 942-43 (due process notice requirements satisfied where a disaster relief program and its terms were published in the Federal Register).

Here, the statute standing alone cannot possibly convey all necessary facts to the public. Reading the statute does not tell the reader of the statute when he or she is

encountering a high voltage line in the real world. The statute informs the public only of its abstract responsibilities to report, including the high-voltage conditions under which that responsibility may arise.

Respondent argues that the statute puts the reader on inquiry notice, so that he or she should affirmatively find out whether any line carries high voltage. But due process ordinarily is violated when statutes are construed as creating inquiry notice. For example, a statute creating a responsibility to answer a court complaint, although it states the conditions under which an answer must be filed, does not put a defendant on inquiry notice to find out whether a complaint has been filed. A central purpose of due process is to assure that the property interest holder need not inquire whether that interest is threatened, but rather will be told when a threat arises. Because the presence of wires was insufficient to put Petitioner on notice of risk even to his own safety, *Lamar Elec. Mem. Corp. v. Carroll, supra,* it is hard to see how those same wires standing alone could put him on notice of danger to his future tort claim.

A second Georgia Power argument was erroneously credited by the Georgia Court of Appeals in this case. That court, even though it lacked subject matter jurisdiction to rule on Petitioner's constitutional claim, opined in dictum that notice to Preston "appears irrelevant." According to that court, Petitioner's statutory employer "had actual notice of the high voltage. In light of the evidence that Ashland was required to give notice to Georgia Power and was aware of the high voltage carried by the power lines, Preston's lack of knowledge is immaterial to the application of OCGA § 46-3-39(a)." (App.,

infra, 8a). The Court of Appeals' analysis is misplaced. Petitioner's lack of knowledge is relevant in the extreme, because he had an independent statutory responsibility to report intended work in order to save his tort claim, regardless of what Ashland did or did not do. The statute expressly defined both Petitioner *and* his employer as "persons responsible for the work," O.C.G.A. § 46-3-32(3), and imposed a duty upon both to report the work. O.C.G.A. § 46-3-33(1).

Although lack of notice to Petitioner *might have become* irrelevant as a practical matter if his employer had reported the work and obviated the necessity for Preston to report, Ashland's awareness itself became irrelevant when Ashland failed to contact Respondent. The onus was back on Preston, but he had not been afforded the information necessary to protect himself. Ultimately, arguing that lack of notice to Petitioner is "irrelevant" because of Ashland's fruitless awareness is like saying that a defendant in a lawsuit is not entitled to service once a co-defendant has been served.

Similarly, in opposing certiorari in the Georgia Supreme Court, Georgia Power responded to Petitioner's due process concerns by arguing that "knowledge by the employer is imputed to the employee; there is no duty to personally warn each employee of a danger." (Brief at 2, n.2) But due process ordinarily guarantees notice reasonably calculated to reach the individual, *Mullane, supra*, 339 U.S. at 314, not notice to a surrogate with unlike interests, *Hansberry v. Lee*, 311 U.S. 32 (1940). Thus if Respondent means to argue that due process notice should be imputed to Preston solely by virtue of Ashland's knowledge, the argument is a mirage.

Alternatively, Respondent may mean to argue that Ashland as statutory employer[3] was a surrogate-in-interest for Preston, and could be counted upon to report the work in order to protect Petitioner's property interest. Ashland, however, concretely demonstrated its lack of interest in the statutory reporting requirements by failing to report its intended work. Having demonstrated its lack of concern, Ashland could hardly be counted upon to share its awareness of the high-tension lines with Petitioner, so that he could report the same work they had failed to report.

Moreover, the parties' interests differed dramatically. Ashland was not Petitioner's surrogate in any realistic sense, because Ashland had no affirmative tort rights to preserve. Ashland lacked incentive to protect Preston's tort rights, which belonged only to Preston. Even the mild incentives Ashland might have had before 1992 to report intended work have been diluted drastically by the 1992 amendment. Ashland is no longer required to indemnify Respondent for any injury to Ashland's workers (under O.C.G.A. § 46-3-40(c)), because Georgia Power is now off the hook entirely absent advance report of the work. But most importantly, Ashland did not share Preston's interest in protecting his potential tort claim.

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[3] In fact, Ashland was not Preston's employer, except for purposes of the workers' compensation exclusion of tort liability. (App., *infra*, 4a-7a). Preston worked for a temporary labor pool. (App., *infra*, 4a).

II. THE RESULT OF THIS CASE WILL BE PRACTICALLY IMPORTANT

This case is significant practically as well as legally and conceptually. The result affects similar victims, in Georgia and potentially elsewhere.

A. This Case Affects High Tension Line Victims Throughout Georgia.

Most directly affected by the outcome of this case are not only Petitioner Preston, but also other worker/victims of high-voltage shocks in Georgia. See, *e.g. Santana v. Georgia Power Co., supra; Malvarez, supra; Lamar Elec. Mem. Corp. v. Carroll, supra.* The reported appellate decisions make clear that such incidents are frequent. See also, *e.g., Buckner v. Colquitt Elec. Mem. Corp.*, 206 Ga.App. 69, 424 S.E.2d 299 (1992); *Three Notch Elec. Mem. Corp. v. Bush*, 190 Ga.App. 858, 380 S.E.2d 720 (1989); *Brown v. Fitzgerald*, 177 Ga.App. 859, 341 S.E.2d 476 (1986); *Habersham Elec. Mem. Corp. v. Dalton*, 170 Ga.App. 483, 317 S.E.2d 312 (1984); *Colquitt Elec. Mem. Corp. v. Cvengros*, 165 Ga.App. 649, 302 S.E.2d 407 (1983). All such victims will lose their potential negligence claims if this Court should decide that utilities need not notify the public of high voltage in their lines.

B. This Case Potentially Affects High Tension Line Victims Generally.

Also potentially affected are similar worker/victims in other states with comparable legislation, which would raise identical due process notice issues. At least twenty-

three states have adopted some variation of the High-voltage Safety Act. Eleven of those statutes, like Georgia's, create a liability to indemnify the utility for failure to report work in advance.[4] One other state simply makes the defaulter liable for all damages resulting.[5] Two others give the utility contribution rights.[6] The remaining nine states' statutes[7] have no provision for reassigning or shifting civil liability for resulting personal injuries.

As yet, no other state's version of the High-voltage Safety Act permits utilities to escape liability altogether for their own negligence. But if the Georgia General Assembly may deprive Petitioner of his tort claim, while omitting to require that utilities post public notice of high voltage, then other states may enact similar statutes lacking suitable notice requirements. Citizens may be

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[4] Those states are Alaska, AS 18.60.685(b); Arizona, A.R.S. § 40-360.44B; Arkansas, Ark. Code Ann. § 11-5-305(a); Idaho, I.C. § 55-2404(2); Massachusetts, M.G.L.A. ch. 166 § 21G(b); Nevada, NRS § 455.240.3; Oklahoma, 63 Okla. St. Ann. § 984; South Dakota, SDCL § 49-32-17; Texas, Health & Safety Code § 752.008 (Vernon); Utah, Utah Code Ann. § 54-8c-4(3); and Wyoming, W.S. § 37-3-305.

[5] Colorado, Col. Rev. St. § 9-2.5-104(2).

[6] Mississippi, Miss. Code 1972 § 45-15-13(2); and Missouri, V.A.M.S. § 319.085.

[7] Alabama, Code Ala. §§ 37-8-52 to 37-8-55; Maryland, Ann. Code Md. Lab. & Empl., §§ 6-101 to 6-110; Nebraska, Rev. St. Neb. §§ 48-436 to 48-442; New Jersey, NJSA §§ 34:6-47.1 to 34:6-47.9; New York, N.Y. Lab. Law, § 202-h (McKinney); North Dakota, N.D. Cent. Code § 49-21.1-01 to 49-21.1-05; Pennsylvania, 43 Pa.C.S.A. §§ 26-1 to 26-7; Tennessee, T.C.A. §§ 68-103-101 to 68-103-108; and Virginia, Code Va. §§ 59.1-406 to 59.1-414.

deprived of factual knowledge necessary to protect their property interests.

This case is important to shock and electrocution victims as a practical matter, as well as significant to the development of "property interests" and due process procedures.

CONCLUSION

This Court should grant the Petition for writ of certiorari.

This 30th day of June, 1998.

Respectfully submitted,

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WHOLE COURT

July 16, 1997

In the Court of Appeals of Georgia

A97A0776. PRESTON V. GEORGIA POWER CO. ET AL. SM-045

A97A0777. INSURANCE COMPANY OF NORTH AMERICA V. GEORGIA POWER CO. ET AL. SM-046

SMITH, Judge.

While cleaning a railroad freight car, Roy Preston was grievously injured by contact with a high-voltage power line. He sought damages from Georgia Power Company, the owner of the power line, and Ashland Chemical Company, for which he was working at the time of the incident. Insurance Company of North America intervened seeking to enforce its subrogation rights under OCGA § 34-9-11.1(b) for its payment of workers' compensation benefits to Preston.[1]

The trial court granted summary judgment to Ashland and Georgia Power. Preston originally appealed to the Supreme Court because he contended the constitutionality of the High-voltage Safety Act, was called into question. Ashland moved to transfer the appeals to this Court, and Preston opposed the transfer on the ground that a constitutional issue had been raised and ruled upon by the trial court in an earlier order, as to which the Supreme Court had refused interlocutory review. The

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[1] In its appeal, Case No. A97A0777, INA has adopted and incorporated by reference Preston's briefs.

Supreme Court granted Ashland's motion to transfer the appeals to this court on the ground that the trial court decided no constitutional issue in the order appealed from. See *Raskin v. Wallace*, 215 Ga.App. 603, 604(1) (451 S.E.2d 485) (1994).

The trial court granted summary judgment to Ashland on the ground of the workers' compensation tort bar and to Georgia Power on the ground of lack of proximate cause. Because Preston was a "borrowed servant" of Ashland at the time of his injury, and because Georgia Power was protected by Ashland's lack of notice of a hazardous activity under the High-voltage Safety Act, OCGA §§ 46-3-30 through 46-3-40, we affirm.

The evidence, construed in Preston's favor, shows the following: Ashland received bulk chemicals via railcar on a siding between its plant and a power line running parallel to the plant wall and the siding. Occasionally, chemicals would become clogged in the hoppers of the railcar, and Ashland employees would be instructed to clean out the railcar from the top. It is undisputed that for many years Ashland's accepted method of cleaning railcars was to lower an employee into the car in a safety harness with a broom or shovel. In May 1992, Ashland's environmental health and safety department recommended a change in this method because of the potential danger of lowering an employee into a confined space with chemical dust. Some time after this recommendation, Ashland began to use a shovel or spader on a 20- to 22-foot metal pole so that employees could stand on top of the railcars to remove the residue. Ashland employees used this spader "long-ways," with the pole parallel to

the length of the railcar, because they were aware they could be hurt by the power lines.

On June 22, 1993, Preston was working for Ashland as a temporary employee assigned by ProTemps, a temporary labor agency. Preston was given the spader and instructed to clean out a railcar. This violated Ashland's policy that no temporary employees were to be allowed on top of railcars. Preston was not given any instructions in the use of the spader. Although he testified he did not see the power lines, he agreed there was nothing to prevent his seeing them and he knew it would be dangerous to touch power wires with a pole. While standing on top of the railcar, he swung the pole at right angles to the track and contacted the power lines, suffering severe personal injury. The power lines were between 26 and 28 feet above the ground and approximately 11 feet to one side of the railroad track; the diagonal clearance was measured at approximately 13 feet from the top of the railcar.

Ashland employees testified that they knew of no personal injury from the power lines on Ashland's premises before Preston was hurt. No evidence was presented that Georgia Power knew Ashland had begun using a 20- to 22-foot metal pole in the vicinity of existing power lines. No witness testified that Georgia Power personnel were present at Ashland on previous occasions when railcars were on the track, when unloading operations were taking place, or when the spader was being used. Georgia Power was never notified that the spader would be used or that work was to be performed within ten feet of its lines.

1. With respect to Preston's claims against Ashland Chemical, the only issue is the application of the workers' compensation tort bar, OCGA § 34-9-11(a). At the time of his injury, Preston was a temporary laborer assigned by his employer, ProTemps, to Ashland Chemical. Ashland contends that it is protected by the statutory bar because Preston was its borrowed servant at the time of his injury. Ashland presented testimony that Preston was under its exclusive supervision and control while working at its facility with respect to the work performed by Preston and its power to discharge him.

Preston, however, points to the testimony of an Ashland "compliance specialist" or safety officer agreeing that he "wouldn't have a problem with" ProTemps substituting another ProTemps worker in Preston's place, and the testimony of an Ashland manager that ProTemps would do the actual firing if Ashland became dissatisfied with Preston. This testimony, he contends, forestalls summary judgment on the issue of whether he was a borrowed servant at the time of his injury.

"[I]n order for an employee to be a borrowed employee, the evidence must show that (1) the special master had complete control and direction of the servant for the occasion; (2) the general master had no such control, and (3) the special master had the exclusive right to discharge the servant." (Citations and punctuation omitted.) *Six Flags Over Georgia, Inc. v. Hill*, 247 Ga. 375, 377(1) (276 S.E.2d 572) (1981). "[A]ll three prongs of the test must focus on 'the occasion when the injury occurred' rather than the work relationship in general." *Stephens v. Oates*, 189 Ga.App. 6, 7 (374 S.E.2d 821) (1988).

Because a temporary labor service "is in the very business of temporarily 'loaning' its employees to others, [cits.]," *Sheets v. J. H. Heath Tree Svc.*, 193 Ga.App. 278, 279 (387 S.E.2d 155) (1989), this court has repeatedly considered the employment status of such agency employees. See, e.g., *Staffing Resources, Inc. v. Nash*, 218 Ga.App. 525, 526 (462 S.E.2d 401) (1995); *Sheets*, supra; *Stephens*, supra. The crucial issue here is whether the extent of control retained by ProTemps over Preston is sufficient to void the third part of the "borrowed servant" test: the exclusive right to discharge.

The Ashland manager's testimony that ProTemps would do the actual firing at the request of Ashland does not show a nonexclusive power to discharge; that theory was expressly addressed and rejected in *Nash*, supra at 526. Here, we must decide whether the Ashland employee's testimony that he would not object to ProTemps's removing Preston and substituting another temporary worker in his place deprives Ashland of its exclusive power to discharge as described in *Nash*, *Sheets*, and *Stephens*. We conclude that it does not.

Even if ProTemps retained some authority to remove Preston from his position at Ashland, the power of the general master to reassign or discharge a borrowed servant is irrelevant to the servant's employment status with the special master. In *Six Flags*, supra, the Supreme Court defined the special master's "exclusive right to discharge" the borrowed servant as the power to *unilaterally* discharge from working on the specific task assigned by the special master and from working for the special master. *Six Flags*, supra at 378(1).

In *Stephens*, supra, relying on the holding in *Six Flags*, this Court reiterated that the focus of the borrowed servant test must be the special master's control at the time of the injury, rather than generally, and that this is also true of "the rights of the special master to discharge the servant and to put another in his place." Id. at 7-8. With respect to Preston, ProTemps "obviously retained some control over him, including the right to terminate his employment as its 'lendable servant.' However, once there was an assignment of appellant to a special master, [ProTemps] relinquished that control during the existence of the 'borrowed servant' relationship." *Sheets*, supra at 279.

This result is consistent with our earlier holding in *Jarrard v. Doyle*, 164 Ga.App. 339, 340 (297 S.E.2d 301) (1982). In *Jarrard*, a hotel employee was temporarily assigned to assist a contractor in performing repair work on the hotel and therefore became a borrowed servant of the contractor. Even though the hotel retained some authority over its employee and "could have taken him off the project and assigned him to other work at any time," id. at 340(1), the contractor, as the special master, "clearly had the exclusive right to control and direct the plaintiff's work on the particular task in question, as well as to dismiss him from that task for unsatisfactory performance" because "the right to discharge that the special master must have means the right to discharge the servant from that particular work." (Citations and punctuation omitted.) Id.

Undisputed testimony was presented that Ashland had unilateral authority to discharge Preston from the work assigned to him; on the morning in question it

removed Preston from his task of labeling cans and directed him to clean the railcar. It could do so without the permission of ProTemps; a ProTemps officer, by affidavit, stated that ProTemps had no authority to countermand such an order. Because Ashland had this unilateral right to discharge Preston from the particular work he was engaged in at the time of his injury, the trial court did not err in holding that Preston was a borrowed servant and that h[illegible] aim was barred by OCGA § 34-9-11(a).

2. Preston also complains of the trial court's grant of summary judgment in favor of Georgia Power on the ground of lack of proximate cause. We need not address Preston's contention because summary judgment was proper under OCGA § 46-3-39(a); Ashland and Preston failed to notify Georgia Power of work taking place within ten feet of its line.

We cannot, as the dissent asserts, attempt to examine the motives of the Supreme Court in first denying an interlocutory application on the constitutionality of the High-voltage Safety Act and then transferring these appeals to this court. The dissent is incorrect in its conclusion that the transfer of these appeals to this court is dispositive of any constitutional issue or circumscribes our authority to rule on an issue that was raised and argued below. See *Atlanta Independent School System v. Lane*, 266 Ga. 657 (469 S.E.2d 22) (1996) (transfer of case to Court of Appeals not dispositive of constitutional issues). It is also incorrect in its assertion that Preston will be unable to raise this issue at a later time. While Preston's interlocutory application to the Supreme Court on the constitutional issue was denied, he will have yet another opportunity to raise it on certiorari.

Under the authority of *Southeast Ceramics v. Klem*, 246 Ga. 294(1) (271 S.E.2d 199) (1980), the Supreme Court had the power to review the constitutional issue raised in the court's earlier interlocutory order when these appeals were filed. It apparently has declined to do so by transferring the appeals to this court. We note, however, that the constitutional issue raised by Preston appears irrelevant. Preston's sole constitutional ground asserts that the High-voltage Safety Act is unreasonable, arbitrary, and capricious because it fails to require the utility to identify which of its lines are high-voltage lines. But a filed and recorded public document in which Ashland granted an electrical power easement to Georgia Power clearly identifies the voltage of the power lines and demonstrates that *Ashland* had actual notice of the high voltage. In light of the evidence that Ashland was required to give notice to Georgia Power and was aware of the high voltage carried by the power lines, Preston's lack of knowledge is immaterial to the application of OCGA § 46-3-39(a).

Whatever the reasons for the transfer, the applicability of the High-voltage Safety Act was raised and fully briefed below and is before us now. We cannot decline to decide this issue by speculating on the reasons for the Supreme Court's transfer as specifically forbidden by that Court in *Lane*. We therefore consider the applicability of the High-voltage Safety Act to this case.[2]

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[2] Although we do not reach the issue, the dissent is also incorrect in its adoption of Preston's claim that he was "blindsided" by the trial court's grant of summary judgment on the issue of proximate cause. While the parties' initial briefs on

Several interlocking provisions of the High-voltage Safety Act set out the duties of persons responsible for performing work near high-voltage lines.[3] OCGA § 46-3-33 provides in pertinent part: "No person, firm, or corporation shall commence any work as defined in paragraph (6) of Code Section 46-3-32 if at any time any person or any item specified in paragraph (6) of Code Section 46-3-32 may be brought within ten feet of any high-voltage line unless and until: (1) The person responsible for the work has given the notice required by Code Section 46-3-34." OCGA § 46-3-34(b) provides: "Where work is to be done, the person responsible for such work shall give notice to the utilities protection center during its regular business hours at least 72 hours, excluding weekends and holidays, prior to commencing such work."

The High-voltage Safety Act provides a restriction on liability in OCGA § 46-3-39: "(a) The owner or operator of high-voltage lines shall not be liable for damage or loss to person or property resulting from work within ten feet of high-voltage lines unless notice has been given as

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summary judgment focused on the High-voltage Safety Act, issues of negligence and proximate cause were fully briefed and litigated below in supplemental briefs by both parties.

[3] " 'Person responsible for the work' means the person actually doing the work as well as any person, firm, or corporation who employs and carries on his payroll any person actually doing the work or who employs a subcontractor who actually does the work." OCGA § 46-3-32(3). " 'Work' means the physical act of performing or preparing to perform any activity under, over, by, or near high-voltage lines." OCGA § 46-3-32(6).

required by Code Section 46-3-34 and the owner or operator of the high-voltage line has failed to comply with the provisions of Code Section 46-3-33. (b) Except as provided in subsection (a) of this Code section, nothing in this part shall be construed or applied so as to limit or reduce the duty or degree of care applicable to owners or operators of high-voltage lines with respect to damage or loss to person or property."

In refusing to grant summary judgment to Georgia Power on the basis of OCGA § 46-3-39(a), the trial court relied upon a number of decisions that predate extensive and substantial amendments to the High-voltage Safety Act. Ga.Laws 1992, p. 2141, sec. 1. Before the 1992 amendment, the Georgia Supreme Court construed the High-voltage Safety Act to hold that even if the Act were violated, the utility nevertheless must show that the lines were properly located and maintained in order to bar recovery. *Malvarez v. Georgia Power Co.*, 250 Ga. 568, 569 (300 S.E.2d 145) (1983). In so holding, the Supreme Court pointed to the language of former OCGA § 46-3-38 (Ga. Code Ann. § 34B-209), which provided in its entirety: "Nothing in this part shall be construed or applied so as to limit or reduce the duty or degree of care applicable to owners or operators of high-voltage lines with respect to damage or loss to person or property." Id. at 569. *Brown v. Southern Bell Tel.&c., Co.*, 209 Ga.App. 99 (432 S.E.2d 675) (1993), relied upon by the trial court, expressly stated that the earlier version of the High-voltage Safety Act was applicable in that case. Id. at 100. While the date of the incident in *Leonardson v. Georgia Power Co.*, 210 Ga.App. 574, 575, n. 1 (436 S.E.2d 690) (1993), is not revealed, the

decision simply relies upon *Malvarez* and does not note the 1992 amendment.

The language of the former Act provided no express restriction on liability like that now codified in OCGA § 46-3-39(a). It simply forbade the performance of certain work near high-voltage lines without notification and without the completion of certain safety measures. See former OCGA §§ 46-3-31 (Ga. Code Ann. § 34B-202); 46-3-32 (Ga. Code Ann. § 34B-203); 46-3-33 (Ga. Code Ann. § 34B-205). On this basis, *Malvarez* and its progeny held that the failure to obey these provisions of the Act did not of itself relieve the utility from liability. *Malvarez*, supra at 569.

The 1992 amendment of the High-voltage Safety Act revised the Act in large part and significantly altered the language relied upon in *Malvarez*. The amendment for the first time provided an explicit restriction on liability and added language that expressly exempts that restriction from the provision that the power line owner or operator's duty or degree of care is not limited or reduced by the Act. See OCGA § 46-3-39(a), (b).

Under the rules of statutory construction, we must construe all related statutes together, give meaning to each part of the statute, and avoid constructions that result in surplusage and meaningless language. *City of Buchanan v. Pope*, 222 Ga.App. 716, 717(1) (476 S.E.2d 53) (1996). Moreover, we must presume that at the time the 1992 amendment was enacted the legislature was aware of the existing law and the *Malvarez* decision. *Hart v. Owens-Illinois*, 250 Ga. 397, 400 (297 S.E.2d 462) (1982). The legislature expressly revised the statute to avoid the

result in *Malvarez*; we must conclude that they intended to do so. This conclusion is consistent with this court's recent holding in *Callaway v. Crown Crafts, Inc.* 223 Ga.App. 297, 299(3) (477 S.E.2d 435) (1996) (physical precedent only),[4] in which we applied the High-voltage Safety Act, as amended, to relieve the owner of a high-voltage line from liability.

A grant of summary judgment must be affirmed if it is right for any reason. *Malaga Mgmt. Co. v. John Deere Co.*, 208 Ga.App. 764, 767(5) (431 S.E.2d 746); see *Precise v. City of Rossville*, 261 Ga. 210, 211(3) (403 S.E.2d 47) (1991). Because Georgia Power was protected under OCGA § 46-3-39(a) by Preston's and Ashland's failure to give the appropriate notice, the trial court correctly granted summary judgment in favor of Georgia Power.

Judgment affirmed. Andrews, C. J., Birdsong, P. J., Eldridge, J., concur. Beasley, J., concurs specially. Ruffin, J., concurs in the judgment only. McMurray, P.J., dissents.

A97A0776. PRESTON V. GEORGIA POWER CO. ET AL. SM-45

A97A0777. INSURANCE COMPANY OF NORTH AMERICA V. GEORGIA POWER COMPANY ET AL. SM-46

BEASLEY, Judge, concurring specially.

I concur fully in Division 1 but I do not fully concur in Division 2.

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[4] The special concurrence in *Callaway* incorrectly applied *Malvarez*, supra, and its progeny without reference to the 1992 revisions of the Act. *Callaway*, supra at 300(2).

For one thing, I do not agree that Preston will have an opportunity to pursue his claim of unconstitutionality of the High-voltage Safety Act on petition for certiorari. If the Supreme Court grants his petition, should he file one, its review will be limited to this Court's rulings, as it will be this Court's action and not that of the superior court which will be subject to review. As stated in *Daniels v. State*, 248 Ga. 591, 592 fn. 1 (285 S.E.2d 516) (1981), when a petition for certiorari is granted and the case is before the Supreme Court, "in its discretion [that] court can consider any matter presented to or decided by the Court of Appeals." *Southeast Ceramics v. Klem*, 246 Ga. 294 (271 S.E.2d 199) (1980), is an illustration. The Constitution provides that "The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance." Ga. Const. 1983, Art. VI, Sec. VI, Par. V. The scope of certiorari, then, is comprised of matters presented to or decided by the Court of Appeals.

This Court cannot decide the constitutionality vel non of a statute (Ga. Const. 1983, Art. VI, Sec. VI, Par. II(1)), and the matter was not and, for the jurisdictional reason, could not be, presented to us. In fact, the issue was presented to the Supreme Court by appellant, but it transferred the case to the Court of Appeals. Even if, as a matter of jurisdictional jurisprudence, the Supreme Court could reach around the Court of Appeals decision and take up on certiorari an issue decided only by the superior court and outside the competency of the Court of Appeals, it is unrealistic to propose that it would do so. Had the Supreme Court viewed the constitutionality issue properly before it on the appeal taken directly to it

by appellant, it would have been compelled by the constitution to accept the case because of its exclusive jurisdiction of such matters. Ga. Const. 1983, Art. VI, Sec. VI, Par. II(1). Instead, it transferred the appeal to this Court. Preston's claim in this regard has effectively been foreclosed. The trial court denied plaintiff Preston's motion to strike Georgia Power Company's defense founded on the Act, which motion was based in part on the charge that the Act was unconstitutional. Preston argued that it violated his rights to equal protection and due process. Although he referred to both the federal and the state constitutions, he did so generally and without any citation to specific provisions. The trial court did not expressly differentiate in its ruling either, although it ruled that Preston had no standing to complain of the lack of equal protection and it ruled that federally protected due process was not contravened by the Act. The court granted a certificate of immediate review at plaintiff's request, but the Supreme Court denied interlocutory appeal. It did not explain its denial.

The Supreme Court has now transferred to this Court Preston's appeal from the order granting both Ashland's and Georgia Power Company's motions for summary judgment. In that order, the trial court noted: "Plaintiff also raises constitutional challenges to the High Voltage Safety Act on equal protection and due process grounds. This court has already ruled adversely to plaintiff on these constitutional issues in the order filed November 17, 1994." Thus, the trial court reiterated and confirmed its ruling on constitutionality and made it part of the summary judgment order as well. That ruling was necessary to its ruling on the remaining grounds, which

depended upon an application of the Act; had it been unconstitutional, Georgia Power Company would not have been entitled to summary judgment.

This Court could not have addressed the issue of constitutionality, for lack of subject matter jurisdiction, and the transfer to this Court merely means that the Supreme Court has discerned some reason it need not exercise its exclusive jurisdiction over the constitutionality issue. In the words used in *Atlanta Independent School System v. Lane*, 266 Ga. 657(1) (469 S.E.2d 22) (1996), "[the] transfer merely represents [the Supreme Court's] determination that [this] was not a case involving a constitutional issue over which [it] had exclusive jurisdiction." Id. This does not mean that the constitutional issue does not have merit. Id. at 658.

The Supreme Court's order states that the case is transferred to this Court "[b]ecause the issue on which the trial court granted summary judgment . . . does not fall within the jurisdiction of this Court." The constitutionality issue falls by the wayside.

On another subject, I must point out that I do concur in footnote 4. In 1992, the general liability of owners and operators of high-voltage lines was eliminated in the ten-foot circumstances described in OCGA § 46-3-39(a). Because of the 1992 amendments to the High-voltage Safety Act, the liability for injury or damage caused by improperly located or improperly maintained lines which is discussed in *Malvarez v. Ga. Power Co.*, 250 Ga. 568 (300 S.E.2d 145) (1983), applies only to instances outside the exception created in subsection (a). See OCGA § 46-3-39(b). The date of the accident in *Callaway v. Crown*

Crafts, Inc., 223 Ga.App. 297 (477 S.E.2d 435) (1996), was after the effective date of the 1992 amendments.

A97A0776. PRESTON V. GEORGIA POWER CO. ET AL.

A97A0777. INSURANCE COMPANY OF NORTH AMERICA V. GEORGIA POWER COMPANY ET AL.

McMURRAY, Presiding Judge, dissenting.

I respectfully dissent as to Division 2 of the majority opinion because, in my view, a fair and sensible reading of the Supreme Court's order transferring the cases sub judice to the Court of Appeals precludes this Court's review of any issue concerning application of the 1992 amendment to Georgia's High-voltage Safety Act, OCGA § 46-3-39(a). I believe the unique procedural circumstances in these cases (both in the trial court and on appeal) takes [sic] the trial court's summary judgment order outside the "right for any reason" rule and focuses [sic] this Court on the sole basis of the trial court's order granting summary judgment to Georgia Power Company ("Georgia Power"), i.e., proximate cause. And as to this issue, I would vacate that part of the trial court's judgment granting summary judgment to Georgia Power, and remand the case to the trial court, because Roy Preston's attorneys were unfairly blind-sided by the proximate cause issue while defending the sole basis of Georgia Power's motion for summary judgment, "whether the action against [Georgia Power] is barred by the provisions of Georgia's High-voltage Safety Act (OCGA § 46-3-30), which was amended in 1992."

Although the trial court rejected Roy Preston's constitutional challenge to OCGA § 46-3-39(a) in an earlier

interlocutory order, the trial court concluded on summary judgment that this 1992 amendment to Georgia's High-voltage Safety Act does not preclude Preston's claims against Georgia Power. The trial court, nonetheless, granted summary judgment based on a finding that Georgia Power's noncompliance with the National Electric Safety Code was not a proximate cause of Roy Preston's injuries. This procedural posture is the basis for the following transfer order entered by the Georgia Supreme Court: "Because the issue on which the trial court granted summary judgment in these cases does not fall within the jurisdiction of this Court, the appeals are hereby transferred to the Court of Appeals. All the Justices concur, except Sears, J., who dissents."

I believe the Georgia Supreme Court's transfer order removes this Court's authority to apply OCGA § 46-3-39(a) based on the "right for any reason" rule and focuses this Court's review to the sole basis of the trial court's order granting summary judgment to Georgia Power, i.e., proximate cause. Saying otherwise, precludes Roy Preston's right to challenge the constitutional validity of the very Code subsection which is the basis of the majority's opinion, OCGA § 46-3-39(a).[5] I, therefore,

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[5] Even so, I cannot go along with majority's view that OCGA § 46-3-39(a) nullifies the Supreme Court's holding in *Malvarez v. Georgia Power Company*, 250 Ga. 568 (300 S.E.2d 145), "that lack of notification [under OCGA § 46-3-34] is a bar to recovery only where the lines are 'otherwise properly located and maintained.' *Carden v. Ga. Power*, [231 Ga. 456, 457 (202 S.E.2d 55)]." *Malvarez v. Georgia Power Co.*, 250 Ga. 568, 569, supra. As Judge Beasley accurately pointed out in a special concurrence in *Callaway v. Crown Crafts, Inc.*, 223 Ga.App. 297,

believe it appropriate to zero-in on the trial court's ruling that Georgia Power's noncompliance with the National Electric Safety Code was not a proximate cause of Roy Preston's injuries.

" 'Although our law concerning motions for summary judgment allows a trial court to grant, sua sponte, a summary judgment, a trial court's authority to do so is not unlimited. The grant of summary judgment must be proper in all other respects. (Cit.) "This means that in addition to ensuring the record supports such a judgment, the trial court must ensure that the party against whom summary judgment is rendered is given full and fair notice and opportunity to respond prior to entry of summary judgment. (Cits.)" (Cit.)' *Hodge v. Sada Enterprise,* 217 Ga.App. 688, 690(1) (458 S.E.2d 876) (1995). ' "The crucial point is to insure that the party against whom summary judgment is sought has had *a full and final opportunity* to meet and attempt to controvert the assertions against him." (Cit.)' *Famble v. State Farm Ins. Co.,* 204 Ga.App. 332, 336(4) (419 S.E.2d 143) (1992)."

300(2) (477 S.E.2d 435), the *Malvarez* rule recognizes the distinct duty imposed upon one maintaining high-tension lines to " 'maintain them in such a manner and at such a location as not to injure persons who might reasonably be expected to come in contact with them.' (Emphasis removed.) [*Buckner v. Colquitt EMC,* 206 Ga.App. 69, 70 (424 S.E.2d 299)]." *Callaway v. Crown Crafts, Inc.,* 223 Ga.App. 297, 300(2), supra. Since there is evidence in the cases sub judice that Georgia Power did not comply with this duty by failing to maintain its power line within standards prescribed by the National Electric Safety Code, I believe genuine issues of material fact remain as to Georgia Power's liability (breach of duty) for any such noncompliance.

(Emphasis in the original.) *Aycock v. Calk,* 222 Ga.App. 763 (476 S.E.2d 274.)

Georgia Power narrowed the scope of its motion for summary judgment with the following statement in its supporting brief: "The sole issue raised by Georgia Power's Motion for Summary Judgment is whether the action against it is barred by the provisions of Georgia's High-voltage Safety Act (OCGA § 46-3-30), which was amended in 1992. It is believed that this is the first occasion for the new Act to be construed." Although the trial court rejected this assertion, Roy Preston was blind-sided by the proximate cause issue in the trial court's summary judgment order. That is to say, Roy Preston's attorneys were simply not given a fair opportunity to address the fact intensive proximate cause issue in the trial court because they were concentrating on Georgia Power's sole request for the trial court to resolve "whether the action against it is barred by the provisions of Georgia's High-voltage Safety Act (OCGA § 46-3-30), which was amended in 1992." Since proximate cause is a matter which should be resolved only in plain, palpable and undisputed cases where reasonable minds cannot differ as to the conclusions to be reached, *Wade v. Mitchell,* 206 Ga.App. 265, 268(4) (424 S.E.2d 810), I believe Roy Preston's attorneys should be provided an opportunity to refine the evidentiary record and do whatever else is necessary to defend the proximate cause issue in the trial court. I stand firm in this view because, even though the evidentiary record in the case sub judice appears well-developed, I believe it unfair to hit a person from the left (so to speak) when that person is defending a blow from the right.

I would vacate that part of the trial court's judgment granting summary judgment in favor of Georgia Power and remand the case to the trial court.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: February 20, 1998

John M. Hyatt
HYATT & HYATT, P.C.
Suite 201 Trust Building
545 North McDonough Street
Decatur GA 30030

Case No. S97C1845

ROY K. PRESTON V. GEORGIA POWER COMPANY et al.

COURT OF APPEALS CASE NO. A97A0776 A97A0777

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

SUPREME COURT OF GEORGIA

Case No. S97C1845 Atlanta, April 01, 1998

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ROY K. PRESTON V. GEORGIA POWER COMPANY et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OR GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

ROY K. PRESTON, Plaintiff,	:	
v.	:	Civil Action
GEORGIA POWER COMPANY and ASHLAND CHEMICAL, INC.,	:	File No. 94-7233-7
Defendants.	:	

ORDER

(Filed July 24, 1996)

The plaintiff in this action was an employee of Pro Search & Pro Temps, Inc. ("Pro Search"). He was assigned to work for defendant Ashland Chemical Inc. ("Ashland") and on June 22, 1993 was directed to clean out a railway car owned by defendant Norfolk Southern Railway Company ("Norfolk"), which was parked on railroad tracks near a high-voltage power line owned by Georgia Power Company ("Georgia Power"). While cleaning out the railway car, plaintiff allegedly struck the power line with the aluminum pole of the spader he was using. Plaintiff asserts that he was severely shocked, thrown from the railroad car, and suffered severe injuries. This case is currently before this court on Ashland's motion for summary judgment, Georgia Power's motion for summary judgment, and plaintiff's motion to compel.

A. Ashland's Motion for Summary Judgment

1. O.C.G.A. § 34-9-11.1

Ashland argues for summary judgment on two grounds. One is that Preston's claims against Ashland are barred under O.C.G.A. § 34-9-11.1 because he did not sue Ashland within one year of the injury. The statute in effect at the time of the injury stated that if the employee failed to sue within one year, the employer or his insurer had an assignment of the employee's tort cause of action. However, the statute was amended effective July 1, 1995 to clarify that the employee has a cause of action until the applicable statute of limitations runs, but the employer or his insurer has the right to file suit if the employee does not sue within one year of the injury.

The amendment states it is retroactive to injuries occurring on or after July 1, 1992. The Georgia Supreme Court upheld this retroactivity as a change in the statute of limitations affecting no vested rights. *Vaughn v. Vulcan Materials Co.*, 266 Ga. 163 (1996); *Accord, Moore v. Savannah Cocoa, Inc.*, 217 Ga. App. 869 (1995). Preston's injury occurred June 22, 1993 and suit was filed against Ashland within the statute of limitations on August 19, 1994. Ashland's motion for summary judgment on the basis that Preston's claims are barred under O.C.G.A. § 34-9-11.1 is hereby denied.

2. Borrowed Servant

Ashland's other argument for summary judgment is that Preston was its borrowed servant and his tort claim against Ashland is barred by the exclusive remedy of workers' compensation. O.C.G.A. § 34-9-11 states that

"[t]he rights and the remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee . . . at common law or otherwise. . . . " Furthermore, O.C.G.A. § 34-9-23, which became effective on July 1, 1994, reaffirmed this exclusivity provision. That section states that "[t]his chapter is intended to provide a complete and exclusive system and procedure for the resolution of disputes between employers and employees." *See also, Pappas v. Hill-Staton Eng'rs., Inc.*, 183 Ga. App. 258, *cert. denied*, 183 Ga. App. 906 (1987).

In Georgia, an employee who is a "borrowed servant" may recover for work-related injuries under workers' compensation from either the general master or the special master, sometimes from both, but may not recover workers' compensation benefits from one employer and maintain an action in tort against the other. *Coca-Cola Co. v. Nicks*, 215 Ga. App. 381 (1994), citing *U.S. Fidelity & Co. v. Forrester*, 230 Ga. 182 (1973). In *Six Flags Over Georgia, Inc. v. Hill*, 247 Ga. 375 (1981), the Supreme Court set forth a three-prong test for a "borrowed servant" to be considered an employee of the special master as well [as] of the general master: 1) the special master had complete control and direction of the servant for that occasion, 2) the general master had no such control, and 3) the special master had exclusive right to discharge the servant. In addition, there must be notice to and assent by the servant as to the special relationship.

Preston in the case *sub judice* agrees that the first two prongs of the test are met but argues that the temporary agency retained the right to discharge him from employment, therefore Ashland did not have the unilateral right

to discharge him and Preston was not a borrowed servant.

The *Six Flags* court analyzed the third prong "exclusive right to discharge" in terms of the particular job the employee was doing at the time of injury, holding that Six Flags had the unilateral right to discharge the employee from work on the task of the moment, the Mindbender (where he was injured), and from work at Six Flags. The court was not concerned with whether the general master had the right to discharge the employee, as well. This is in accord with *Fulghum Industries v. Pollard Lumber Co.*, 106 Ga. App. 49 (1962), cited by the *Six Flags* court. *Fulghum* clarifies the third prong as "(3) that the special master must have the exclusive right to discharge the servant, to put another in his place or to put him to other work. [Cits]" *Fulghum* at 52.

A later case which is in accord and factually on point is *Stephens v. Oates*, 189 Ga. App. 6 (1988). A Kelly Temporary Services employee was assigned to work side-by-side with TG & Y warehouse employees. Kelly paid the temporary employee, but TG & Y supervised her and told her how and when to work. The injured employee argued that Kelly had the exclusive right to discharge her, not TG & Y. The Court of Appeals upheld the trial court's grant of summary judgment to TG & Y on the basis that the employee was a borrowed servant in its employ, citing *Six Flags* that the three-prong test is to be applied as of the time of the injury and that the third prong was met if the special master could discharge the employee for unsatisfactory work at that job assignment. *Accord, Nash v. Staffing Resources, Inc.*, 218 Ga. App. 525 (1995) (holding that a temporary employee was a borrowed servant of an

employer when the employer made the decision to terminate the worker from a temporary assignment but the staffing agency actually fired the temporary employee it had placed with the employer.) *See also, Jarrard v. Doyle*, 164 Ga. App. 339 (1982) (defining the third prong as the "right to discharge from that particular work.")

Charter Builders, Inc. v. Sims Crane Service, Inc., 150 Ga.App. 100 (1979) is factually distinguishable in that the special master had to call the general master before removing a crane operator from the job. The crane operator was held not to be a borrowed servant. In *Sheets v. J.H. Heath Tree Service, Inc.*, 193 Ga. App. 278 (1989), a Labor Pool employee was assigned work with the tree service (Heath). The Court of Appeals upheld the trial court grant of summary judgment that the employee was Heath's borrowed servant on the basis that Heath had the exclusive right to control and discharge insofar as this job was concerned. Plaintiff in the case *sub judice* seizes on language in *Sheets* that the Labor Pool relinquished control over the employee when assigned to the special master, and argues that in the case *sub judice*, Pro Temps did not relinquish its control. That is inapposite here, as Pro Temps did relinquish day-to-day control of plaintiff's work.

In *Southern Railway Co. v. Hand*, 216 Ga. App. 370 (1995), Hand was employed by Bankhead Maintenance Co. as a foreman of welding crews working on the rails of Southern Railway ("Southern"). Southern moved for summary judgment that Hand was its borrowed servant when injured and proved that Southern assigned his daily work, took him to job sites many times, helped him unload his truck and prepare his work sites, could

remove him from one job site or move him to another job, and could make him re-do a job. The Court of Appeals, citing *Six Flags*, held that Southern failed to establish that Southern had the exclusive right to discharge the employee and that Bankhead had no control or direction over him for the occasion at issue. Preston asserts *Hand* as authority that Ashland must prove it alone could discharge Preston.

Hand, when read in conjunction with *Six Flags*, requires that the analysis of "unilateral right to discharge" be done in regard to the particular job Preston was on when he was injured. Because Ashland had the right to tell Preston to stop work on the railroad car and/or leave Ashland's premises just prior to the injury, and could have done that *without permission of Pro Temps*, the third prong of the *Six Flags* test is met.

This court notes that O.C.G.A. § 34-9-11(c), which became effective April 7, 1995, grants immunity from tort liability to a business using a temporary service when workers' compensation is provided either by the temporary service or by the business. Plaintiff argues this was done to remedy a gap in existing law and cites to other sections of the workers' compensation code which provide that a "temporary help contracting firm" and "employee leasing company" are employeers who must provide workers' compensation benefits to temporary workers. However, the new code section also provides that such temporary firms are statutory employers for workers' compensation purposes. Given the sizable and consistent body of case law cited previously which holds both employers to have tort immunity, it appears this new section merely codifies existing case law.

Since plaintiff was Ashland's borrowed servant, plaintiff's tort claim is barred by the exclusive remedy of workers' compensation, and Ashland's motion for summary judgment is granted.

B. Georgia Power's Motion for Summary Judgment

Georgia Power argues that O.C.G.A. § 46-3-39 bars any recovery for plaintiff because it was not given notice of the work within ten feet of the high voltage line so that it could shut off the power or otherwise make the area safe. Affidavits submitted from a Georgia Power supervisor and a supervisor at the Utilities Protection Center attest that there is no record of any notice being given. Georgia Power also argues that plaintiff and his employer, defendant Ashland, are strictly liable for the damage because of their lack of notice to the utility under O.C.G.A. § 46-3-40(b).

Plaintiff agrees that Georgia Power is not liable under the High Voltage Safety Act (HVSA) for the accident itself since it was not given notice and had no opportunity to turn off the power, but that Georgia Power remains liable for any negligence based on failure to maintain the high voltage line at a proper distance under three other sources of liability, the National Electrical Safety Code (NESC), Georgia Power's own in-house standards, and common law liability. Plaintiff cites *Carden v. Georgia Power*, 231 Ga. 456 (1973) for the basis of common law liability, that Georgia Power has a duty to maintain the high voltage lines "in such a manner and at such a location as not to injure persons who might be reasonably

expected to come in contact with such lines." *Carden* at 456-457.

Plaintiff also raises constitutional challenges to the High Voltage Safety Act on equal protection and due process grounds. This court has already ruled adversely to plaintiff on these constitutional issues in the order filed November 17, 1994.

Plaintiff also cites *Malvarez v. Georgia Power*, 250 Ga. 568 (1983) that lack of notice under this statute will bar recovery by an employee only if the high voltage line was "properly located and maintained." *Id.* at 569. *Malvarez* referenced then O.C.G.A. § 46-3-38 [which is now O.C.G.A. § 46-3-39(b)] that "[n]othing in this part shall be construed or applied so as to limit or reduce the duty or degree of care applicable to owners or operators of high-voltage lines with respect to damage or loss to person or property." Georgia Power contends the July 1992 amendment which added subsection (a) to O.C.G.A. § 46-3-39 negates the *Malvarez* holding. O.C.G.A. § 46-3-39(a) states that Georgia Power "shall not be liable for damage . . . resulting from work within ten feet . . . unless notice has been given . . . and [Georgia Power] has failed to" cut off the power or otherwise make the area safe.

Plaintiff argues that he was not engaged in a "trade or business" [the only activity for which notice is required pursuant to the definition section, O.C.G.A. § 46-3-32] because he was a temporary employee and that since he never knew what he would be working on from one moment to the next, he could not give the required 72-hour advance notice. Georgia Power argues that plaintiff was engaged in his employer's "trade or business"

even though his employment was short-term. The evidence shows plaintiff was engaged in the trade or business of his employer.

Plaintiff also argues that the indemnification language used in O.C.G.A. § 46-3-40(b) must mean that Georgia Power has liability, because such language would not be necessary without liability. However, this language clearly applies in situations where Georgia Power may be held liable to a third-party because of an accident, e.g., for power outages, or for property damage to its own property or others' property, regardless of how the accident occurred.

This court has reviewed the HVSA prior to the July 1992 amendment and after that amendment. At the time *Carden, supra,* was decided, former code O.C.G.A. § 46-3-31 exempted a worker from notification responsibility, and made his employer liable to him for any injuries resulting from a failure of the employer to notify Georgia Power. That section was repealed effective July 1, 1992 when O.C.G.A. § 46-3-39(a) was added and the definition of "person responsible for the work" was rewritten to include the worker as well as the employer. The indemnification section was also added July 1992, as was O.C.G.A. § 46-3-40(c) which makes Georgia Power liable for costs incurred by the employer if Georgia Power delays in making the area safe. Read as a whole, the July 1992 amendments broaden the definition of who is to give notice by adding those actually doing the work as well as the employer, and by requiring notice in more situations, when work is done within 10 feet of the power line rather than 8 feet. O.C.G.A. § 46-3-33, formerly O.C.G.A. § 46-3-32.

Plaintiff was a "person responsible for the work" and his activity was "work" done in the pursuit of his trade or business, and therefore he did have notification responsibility under O.C.G.A. § 46-3-39. It is undisputed that notice was not given. However, the July 1992 amendments did not relieve Georgia Power of responsibility for properly locating and maintaining power lines. *Malvarez, supra; Carden, supra.* Two recent cases make this plain. *Leonardson v. Georgia Power Co.*, 210 Ga. App. 574 (1993) cited *Malvarez* in a footnote for the proposition that negligent installation or maintenance of high-voltage lines which cause injury is actionable even though no notice was given. *Brown v. Southern Bell Tel. & Tel Co.*, 209 Ga. App. 99 (1993) held that a claim of negligence against Southern Bell was barred by the lack of notice, after finding that the wire height met industry standards.

In the case *sub judice*, plaintiff was using a 20-foot metal pole with a spader on the end while on top of the railroad car. Nies Dep. at 38-39, 44, 47. According to plaintiff's expert, plaintiff's pole either touched one of the power lines or came within about one inch of the power line somewhere in the last five feet of the 20-foot long pole. Nies Dep. at 46-48. The power line did not cross over the railroad track. Nies Dep. at 52-53. Plaintiff's expert based his opinion on the 1987 NESC standards, but the standards in effect at the time of the 1993 accident were the 1990 NESC standards. Nies Dep. at 49, 107. Plaintiff's expert calculated that the actual vertical clearance of the power line was 26 feet, 7 inches compared to the 1990 NESC standard of 26 feet, 6 inches. Nies Dep. at 62-63, 128. The evidence shows that the actual horizontal clearance was 11 feet, 1 inch compared to the

1990 NESC standard of 11 feet, 6 inches [15 feet less than the vertical clearance standard.] Nies Dep. at 76-77, 66, 127. The evidence shows that the third NESC standard, the diagonal clearance from the top of the railroad car to the power line, was 6 feet, 6 inches in 1990 [20 feet less than the vertical clearance standard] and that clearance was met. Nies Dep. at 67. The NESC standards are based on an assumed height of a railroad car of 20 feet but the railroad car in question was actually less, about 17 feet high. Nies Dep. at 68-69. Therefore, there was greater working room atop the railroad car than required by the NESC standards.

Plaintiff's expert testified that Georgia Power in-house standards were higher than NESC standards for the vertical clearance, at 33 feet. Nies Dep. at 86, 101-102. He testified that he could not find any specifications in the in-house manual for horizontal and diagonal clearances so he presumed NESC standards applied. Nies Dep. at 101-102. Georgia Power's specifications sheets in evidence show that the 33 feet clearance applies where power lines cross over railroad tracks and do not show the applicable clearance where power lines run alongside the tracks. Distribution Specifications filed July 21, 1995 at p.2.10. Those specifications sheets show that NESC standards apply in general. Distribution Specifications filed July 21, 1995 at p.2.01.

The movant for summary judgment must show there is no genuine issue of material fact and the undisputed evidence, when viewed most favorably to the nonmovant, warrants judgment as a matter of law. O.C.G.A. § 9-11-56(c); *Lau's Corp. v. Haskins*, 261 Ga. 491 (1991). The defendant may do so by showing an absence of proof of

at least one element of the plaintiff's case. *Lau's Corp., supra.* Ordinarily, issues of negligence and proximate cause are jury questions, but in clear and palpable cases may be properly decided as a matter of law. *Gammage v. Graham,* Case No. A96A0820 (May 1, 1996).

The issue in the case *sub judice* is whether the power line was properly located according to the 1990 NESC which was in effect at the time of the June 1993 accident. NESC 1990 Edition at 013B1, 013B3. There is no evidence of improper maintenance, nor that Georgia Power's in-house standards for a power line running alongside a track were different from NESC standards. Based on the testimony of plaintiff's expert, the power line was not directly over the railroad car, but approximately 11 feet off to the side and more than 26 feet in the air. The NESC vertical and diagonal standards were met, and the horizontal standard was five inches short of being met. The key is the diagonal clearance because it was the working space atop the car where plaintiff was handling the pole, Plaintiff's evidence shows that the pole cold have come in contact with, or within one inch of, the power line anywhere within the last five feet of the pole and therefore fails to show that an additional five inches of horizontal clearance would have made any difference.

There being no evidence that any negligent location or maintenance of the power line under either NESC or Georgia Power in-house standards was a proximate cause of the incident, this court grants Georgia Power's motion for summary judgment.

C. Plaintiff's Motion to Compel

In view of this court's rulings on the motions for summary judgment, plaintiff's motion to compel discovery from defendant Ashland is moot.

SO ORDERED this 22nd day of July, 1996.

/s/ Daniel M. Coursey, Jr.
Daniel M. Coursey, Jr.
Judge, DeKalb County
Superior Court

copies sent to:
Hardy Gregory, Esq.
Phillip S. McKinney, Esq.
Robert L. Pennington, Esq.
James M. Poe, Esq.

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

ROY K PRESTON,

Plaintiff,

v.

Civil Action File No.
94-7233-7

GEORGIA POWER COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, and ASHLAND CHEMICAL COMPANY, a division of Ashland Oil, Inc.,

Defendants.

ORDER

(Filed Nov. 17, 1994)

The plaintiff in this action was an employee of Pro Search & Pro Temps, Inc. ("Pro Search"). According to the allegations in the complaint, he was assigned to work for defendant Ashland Chemical Inc. ("Ashland") and on the day the accident occurred was directed to clean out a railway car owned by defendant Norfolk Southern Railway Company ("Norfolk"), which was parked on railroad tracks underneath a high-voltage power line owned by Georgia Power Company ("Georgia Power"). While cleaning out the railway car, plaintiff allegedly struck the power line with the aluminum pole of the brush he was using. Plaintiff asserts that he was severely shocked, thrown from the railroad car and suffered severe injuries. This case is currently before this court on plaintiff's motion to strike the first defense of Georgia Power and defendant Norfolk's motion to add Insurance Company

of North America ("INA") and Pro Search as party plaintiffs.

A. Motion to Strike

In its answer to the complaint, Georgia Power raised a number of defenses. As its first defense, Georgia Power stated, "Plaintiff's right to recover damages from this Defendant is barred by the terms of O.C.G.A. § 46-3-30 et seq. in that Plaintiff was working within ten feet (10') of a high voltage line without any notice of such work having been given to this Defendant or the Utilities Protection Center." Plaintiff asserts in his motion to strike that this defense is not sufficient for several reasons. First, he argues that the defense is not sufficient because the High-voltage Safety Act (the "Act"), codified at §§ 46-3-30 et seq., is a bar only where the power lines are otherwise properly located and maintained. Second, plaintiff argues that the defense is insufficient because the circumstances alleged in the complaint are not within the scope of the Act or the Act provides a specific exception for the alleged circumstances. Third, he argues that the defense is insufficient because Georgia Power already had notice of the work. Finally, plaintiff argues that the defense should be struck because the statute is an unconstitutional violation of both equal protection and due process. Defendant Georgia Power responded to all of the arguments made in plaintiff's motion.

O.C.G.A. § 9-11-12(f) provides, "[u]pon motion made by a party within 30 days after the service of the pleading upon him . . . the court may order stricken from any pleading any insufficient defense. . . . " The law in this state, however, is very clear that motions to strike are not

favored "[A] motion to strike a defense should not be granted unless it appears to a certainty that the plaintiff would succeed despite any state of facts which could be proved in support of the defense." *Medlin v. Carpenter*, 174 Ga. App. 50, 55 (1985). *See also, Unigard Ins. Co. v. Kemp*, 141 Ga. App. 698, 699 (1977); *West v. Griggs*, 144 Ga. App. 285, 286 (1977); *Potpourri of Merrick, Inc. v. Gay Gibson, Inc.*, 132 Ga. App. 565, 567 (1974); *Wellbaum v. Murphy*, 122 Ga. App. 654, 655 (1970). In responding to the motion, defendant Georgia Power offered several arguments which, if proved in support of the defense, would bar plaintiff's claim under the statute.

In addition to the factual arguments, plaintiff raised a constitutional challenge to the statute as a violation of equal protection and due process. Plaintiff first argues that the statute violates equal protection because the Act insulates owners and operators of high voltage lines from liability, which is a special privilege not given to the owners and operators of other businesses. As Georgia Power correctly points out, plaintiff does not have standing to raise an equal protection challenge on this ground. One who is not injured by this part of the statute cannot bring an equal protection claim against it. *E.g., Davis v. Shavers*, 263 Ga. 785 (1994); *C.W. Matthews Contracting Co. v. Gover*, 263 Ga. 108 (1993); *Tempo Management v. DeKalb County*, 258 Ga. 713 (1988).

Next, plaintiff argues that the Act violates due process for two reasons. First, he argues that the Act is unconstitutional because it eliminates a common law right of action. This court notes however, that this argument is completely unsupported by law. For over one hundred years the United States Supreme Court has held that the

Constitution and the due process clause does not forbid this type of legislative action. *See, Duke Power Co. v. Carolina Env'l Study Group*, 438 U.S. 59, 88 n.32 (1978), and cases cited therein.

Second, plaintiff argues that the Act violates due process because it gives a utility company the right to own and operate high-voltage electric lines without also requiring disclosure to the public as to the voltage in the electric lines. Plaintiff asserts that because there is no way for the general public to determine what is and is not a high-voltage line, the Act is unconstitutional. However, under Constitutional due process analysis a statute is sufficiently clear if men of common intelligence need not guess at its meaning or differ as to its application. *See, Broaderick v. Oklahoma*, 413 U.S. 601 (1973); *Gouge v. City of Snellville*, 249 Ga. 91, 93 (1982). The High-voltage Safety Act meets this standard. The Act explicitly defines "high-voltage lines" as any "electric line or lines installed above ground level having a voltage in excess of 750 volts between conductors or from any conductor to ground." O.C.G.A. § 46-3-32(1). Simply because the Act does not impose an affirmative duty on owners or operators to post notice of the voltage does not mean that the general public cannot determine whether an electrical line is "high-voltage."

For the above reasons, plaintiff's motion to strike is denied.

B. Motion to Join a Necessary Party

Defendant Norfolk filed this motion to join INA and Pro Search as "necessary parties" to this action. Briefly,

INA is the workers' compensation carrier for Pro Search, plaintiff's employer at the time of his injury. Defendant Norfolk argues that under O.C.G.A. § 34-9-11.1, INA and Pro Search may have a right of subrogation against Norfolk for workers' compensation benefits paid to plaintiff. In addition, Norfolk attached a copy of the notice of INA's lien in this case for $318,183.46 plus any future benefits paid to plaintiff. Because INA and Pro Search may have rights against Norfolk it argues that they are necessary parties and Norfolk cannot obtain complete relief in this action without their presence as plaintiffs.

The motion is denied. Under this Code section, the right of action belongs to the injured employee or his heirs, and the employer or insurance carrier "shall have a subrogation lien" against the *employee* for any recovery made in any cause of action. O.C.G.A. §§ 34-9-11.1(a) and (b). If the employee fails to bring the action within one year, however, that failure "shall operate as an assignment to the employer or such employer's insurer of any cause of action in tort which the injured employee . . . may have against any other person for such injury or death . . . " In the latter situation, the employer or insurance carrier would have claims against any defendant in tort, including Norfolk in this action.

In the present case, the alleged injury occurred on June 22, 1993, and this action was filed on June 14, 1994, within the one year period of limitations. Since this action was filed within one year, INA and Pro Search's right to subrogation is against *plaintiff*, and defendant Norfolk's rights will not be affected by the subrogation lien filed by INA. For the above reasons, this court finds that Norfolk's rights can be fully adjudicated without the addition

of INA or Pro Search, and the motion to join necessary parties is denied.

SO ORDERED this 14th day of November, 1994.

/s/ Daniel M. Coursey, Jr.
Daniel M. Coursey, Jr.
Judge, DeKalb County
Superior Court

copies sent to:
Edgar A. Neely, Jr., Esq.
Hardy Gregory, Jr., Esq.
John M. Hyatt, Esq.
Robert L. Pennington, Esq.
Phillip S. McKinney Esq.

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

ROY K. PRESTON, Plaintiff,	)	Case No. 94-7233-7
v.	)	
GEORGIA POWER COMPANY and GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY, Defendants.	)	

PLAINTIFF'S MOTION TO STRIKE THE FIRST DEFENSE OF DEFENDANT GEORGIA POWER COMPANY

COMES NOW plaintiff and moves the Court pursuant to O.C.G.A. § 9-11-12(f) to strike the first defense of defendant Georgia Power Company and respectfully shows to the Court as follows:

1.

The first defense raised by defendant Georgia Power Company is as follows: "Plaintiff's right to recover damages from this Defendant is barred by the terms of O.C.G.A. § 46-3-30 et seq. in that Plaintiff was working within ten feet (10') of a high voltage line without any notice of such working having been given to this Defendant or the Utilities Protection Center."

* * *

Said defense is an insufficient defense for if the statute upon which it is based is applied to the circumstances alleged in the complaint in this case, it is unconstitutional under the federal and state constitutions in that it denies equal protection of law and due process of law.

This 1 day of August, 1994.

DAVIS, GREGORY, CHRISTY & FOREHAND

By: /s/ Hardy Gregory, Jr.
HARDY GREGORY, JR.
State Bar No. 310100

By: /s/ Gary C. Christy
GARY C. CHRISTY
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By: /s/ David A. Forehand, Jr.
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[404] 378-3635

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

ROY K. PRESTON, Plaintiff,	)	Case No. 94-7233-7
v.	)	
GEORGIA POWER COMPANY and GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY, Defendants.	)	

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE THE FIRST DEFENSE OF DEFENDANT GEORGIA POWER COMPANY

* * *

It is a denial of due process of law for the Georgia statutes to confer upon a utility company the right to own and operate high voltage power lines which are an undisclosed peril and at the same time require those who are unaware of the undisclosed peril to give notice that they are in close proximity to the undisclosed peril. The High Voltage Act applies only where the line has a voltage in excess of 750 volts between conductors or from conductor to ground. O.C.G.A. § 46-3-32(1) There are many, many power lines all across this state and some of them are high voltage lines and many of them are not. The public simply has no way of knowing which are which. The peril of high voltage is thus undisclosed by the utility companies to the public. To require someone to give notice that he is in proximity to an undisclosed peril

denies due process of law. Perhaps the statute could be corrected to require the utility company to post reasonable and adequate warning that the line is a high voltage line and that notice of any work to be done within ten feet of the line must be given. To expect the public at large to know which lines are high voltage lines and which are not is unreasonable to such an extent as to deny due process of law. *Cf. Davis v. City of Peachtree City*, 251 Ga. 219(1), 304 S.E.2d 701 (1983).

DAVIS, GREGORY, CHRISTY &
FOREHAND

By: /s/ Hardy Gregory, Jr.
HARDY GREGORY, JR.
State Bar No. 310100

By: /s/ Gary C. Christy
GARY C. CHRISTY
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IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

ROY K. PRESTON, Plaintiff, vs. GEORGIA POWER COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY and ASHLAND CHEMICAL, INC., Defendants.	CIVIL ACTION FILE NO. 94-7233-7

CERTIFICATE OF IMMEDIATE REVIEW

(Filed Nov. 23, 1994)

This Court having denied Plaintiff Roy K. Preston's Motion to Strike certain defenses raised by Georgia Power Company by Order dated November 17, 1994, now, and within ten (10) days of the entry of such Order, pursuant to O.C.G.A. Section 5-6-34, the Court hereby certifies that the Order is of such importance to the case that immediate review should be had, and that direct appeal is proper.

This the 23rd day of Nov., 1994.

/s/ Daniel M. Coursey, Jr.
Daniel M. Coursey, Jr., Judge,
Superior Court/Stone Mountain
Judicial Circuit

Submitted By:

/s/ John M. Hyatt
John M. Hyatt
GA Bar No. 381350
Attorney for Plaintiff

SUPREME COURT OF GEORGIA

Case No. S95I0405 Atlanta, January 3, 1995

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ROY K. PRESTON V. GEORGIA POWER COMPANY et al.

From the Superior Court of DEKALB County.

Upon consideration of this Application for Interlocutory Appeal, it is ordered that it is hereby denied.

All the Justices concur, except Hunt, C. J., and Thompson, J., who are disqualified.

[SEAL]

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb, Chief Deputy Clerk.

IN THE SUPREME COURT

STATE OF GEORGIA

ROY K. PRESTON,	)(	
Appellant,	)(	
	)(	
v.	)(	NO. S97A0022
GEORGIA POWER COMPANY,	)(	
NORFOLK SOUTHERN	)(	
RAILWAY COMPANY, and	)(	
ASHLAND	)(	
CHEMICAL COMPANY,	)(	
	)(	
Appellees.	)(	

BRIEF OF APPELLANT

HARDY GREGORY, JR.
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Attorneys for Appellant

RECEIVED BY HAND DELIVERY
AND FILED:

OCT. 04, 1996

/s/ Jan Eidson
SUPREME COURT OF GEORGIA

* * *

The constitutional flaw in the statute is that it has no requirement that the utility company identify which of its lines are high voltage lines. Of the thousands of lines criss-crossing the state, some are high voltage and some are not. The public has no way of knowing the difference by looking at the lines themselves. The lines involved in this case were not identified as high voltage lines. (R. 1289-1291. Dep. Straka, pp. 63-65; R. 902. Dep. Perkins, p. 31) If one does work near a power line that has a voltage of 750 or less the statute is not violated, no crime is committed and liability is not removed from the utility company. If one does work within ten feet of a line having a voltage above 750 these criminal and civil penalties exist under the statute. But the difference between high voltage and non high voltage lines is not apparent to the public. It is entirely arbitrary from the standpoint of the public whether a line is high voltage or not. Thus the statute is unreasonable, arbitrary and capricious. The simple solution would be for the statute to require the utility to identify its high voltage lines. It is not a sufficient answer to impose a duty on the public to determine who is the owner of the line and track that entity down and wait for information regarding the voltage of a given line when it would be so easy to identify the line when it

is installed. The law is unreasonable and arbitrary without some notification of which lines are high voltage lines.

* * *

IN THE SUPREME COURT OF GEORGIA

ENUMERATIONS OF ERROR

* * *

2. The trial court erred in granting summary judgment to Georgia Power Company. (R. 2056. Order) Prior to granting summary judgment the trial court erred in denying Plaintiff's Motion to Strike. (R. 201. Order denying Motion to Strike)

* * *

[LOGO] **SUPREME COURT OF GEORGIA**

Case Nos. S97A0022
S97A0024

Atlanta December 2, 1996

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed

ROY K. PRESTON v. GEORGIA POWER COMPANY et al.

INSURANCE COMPANY of NORTH AMERICA v. GEORGIA POWER COMPANY et al.

From the Superior Court of DeKalb County.

Because the issue on which the trial court granted summary judgment in these cases does not fall within the jurisdiction of this Court, the appeals are hereby transferred to the Court of appeals. All the Justices concur, except Sears, J., who dissents.

[SEAL]

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the Minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court Hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb,
Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF GEORGIA

ROY K. PRESTON, Petitioner.	)( )( )(	
v.	)(	NO. F97C1845
GEORGIA POWER COMPANY, and ASHLAND CHEMICAL COMPANY, Respondents.	)( )( )( )( )(	

PETITION FOR CERTIORARI

DAVIS, GREGORY,
CHRISTY & FOREHAND

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IN THE SUPREME COURT
STATE OF GEORGIA

ROY K. PRESTON,	)(	
Petitioner,	)(	
	)(	
v.	)(	NO. _____
GEORGIA POWER COMPANY, and ASHLAND CHEMICAL COMPANY,	)(	
	)(	
	)(	
Respondents.	)(	

PETITION FOR CERTIORARI

* * *

Preston has been unable to obtain a review of his constitutional challenge, twice made in the trial court, against the statute that the Court of Appeals has used to destroy his claim.

* * *

[He challenged] the failure of the statute to require the utility to identify its high-voltage lines so that persons are aware and can give notice of work to be commenced. This raised a due process argument.

* * *

This issue did not become ripe for a constitutional challenge until the Court of Appeals held in the opinion now being challenged that Preston must give notice.

* * *

Official Code of Georgia Annotated

46-3-30. Short title.

This part shall be known and may be cited as the "High-voltage Safety Act." (Code 1981, § 46-3-30, enacted by Ga. L. 1992, p. 2141, § 1.)

46-3-31. Purpose of part.

The purpose of this part is to prevent injury to persons and property and interruptions of utility service resulting from accidental or inadvertent contact with high-voltage electric lines by providing that no work shall be done in the vicinity of such lines unless and until the owner or operator thereof has been notified of such work and has taken one of the safety measures prescribed in this part.

46-3-32. Definitions.

As used in this part, the term:

(1) "High-voltage lines" means an electric line or lines installed above ground level having a voltage in excess of 750 volts between conductors or from any conductor to ground.

(2) "Notice" means actual notification given to the center.

(3) "Person responsible for the work" means the person actually doing the work as well as any person, firm, or corporation who employs and carries on his payroll any person actually doing the work or who employs a subcontractor who actually does the work;

* * *

(4) "Utilities protection center" or "center" means the corporation or other organization formed by utilities which receives advance notifications regarding work and distributes such notifications to its utility members.

(5) "Utility" means any person operating or maintaining high-voltage lines within the state.

(6) "Work" means the physical act of performing or preparing to perform any activity under, over, by, or near high-voltage lines, including, but not limited to, the operation, erection, handling, storage, or transportation of any tools, machinery, ladders, antennas, equipment, supplies, materials, or apparatus or the moving of any house or other structure whenever such activity is done by a person or entity in pursuit of his trade or business.

46-3-33. Required conditions for commencing work within ten feet of high-voltage line.

No person, firm, or corporation shall commence any work as defined in paragraph (6) of Code Section 46-3-32 if at any time any person or any item specified in paragraph (6) of Code Section 46-3-32 may be brought within ten feet of any high-voltage line unless and until:

(1) The person responsible for the work has given the notice required by Code Section 46-3-34; and

(2) The owner or operator of such high-voltage line has effectively guarded against danger from accidental contact by either deenergizing and grounding the line, relocating it, or

installing protective covering or mechanical barriers, whichever safeguard is deemed by the owner or operator to be feasible under the circumstances.

46-3-34. Utilities protection center; funding of activities; notice of work; delay; responsibility for completing safety requirements.

* * *

(b) Where work is to be done, the person responsible for such work shall give notice to the utilities protection center during its regular business hours at least 72 hours, excluding weekends and holidays, prior to commencing such work and such notice shall:

(1) Describe the tract or parcel of land upon which the work to be done is to take place with sufficient particularity to enable the owner or operator of the high-voltage lines to ascertain the precise tract or parcel of land involved;

(2) State the name, address, and telephone number of the person who will be in charge of the work;

(3) Describe the type of work to be engaged in by the person; and

(4) Designate the date upon which the work will commence and will be completed.

(c) After receipt of the notice required by subsection (b) of this Code section, the owner or operator of the high-voltage line shall contact the person whose name is given as required by paragraph (2) of subsection (b) of this Code section within a reasonable time, so that appropriate satisfactory arrangements can be made for the

completion of the safety precautions required by Code Section 46-3-33, including coordination of work schedules and payment of costs required to effect such safety precautions. Upon completion of such arrangements, the owner or operator of such high-voltage line shall effect such safety precautions within a reasonable time.

* * *

46-3-39. Restriction on liability of owners and operators of high-voltage lines; effect of part on duty or decree [sic] of care.

(a) The owner or operator of high-voltage lines shall not be liable for damage or loss to person or property resulting from work within ten feet of high-voltage lines unless notice has been given as required by Code Section 46-3-34 and the owner or operator of the high-voltage line has failed to comply with the provisions of Code Section 46-3-33.

(b) Except as provided in subsection (a) of this Code section, nothing in this part shall be construed or applied so as to limit or reduce the duty or degree of care applicable to owners or operators of high-voltage lines with respect to damage or loss to person or property.

46-3-40. Criminal penalty; strict liability for injury or damage; indemnification; liability for cost of delay.

(a) Any person responsible for the work who violates any of the provisions of this part shall be guilty of a misdemeanor and, upon conviction thereof, shall be liable

for a fine of $1,000.00 for a first offense and $3,000.00 for a second or subsequent offense.

(b) Any person responsible for the work who violates the requirements of Code Section 46-3-33 and whose subsequent activities within the vicinity of high-voltage lines result in damage to utility facilities or result in injury or damage to person or property shall be strictly liable for said injury or damage. Any such person shall also indemnify the owner or operator of such high-voltage lines against all claims, if any, for personal injury, including death, property damage, or service interruptions, including costs incurred in defending any such claims resulting from work in violation of Code Section 46-3-33.

(c) In the event the owner or operator of the high-voltage line fails to effect the safeguards required by Code Section 46-3-33 within a reasonable time after notice is given and appropriate arrangements are made pursuant to Code Section 46-3-34, such owner or operator shall be liable for the reasonable costs incurred by any such delay.

In the Supreme Court of Georgia

Decided: **FEB 23 1998**

S97A2055, SANTANA et al. v. GEORGIA POWER CO. et al.

BENHAM, Chief Justice.

* * *

3. Appellants maintain their due process rights were violated because the HVSA does not require the owner or operator of power lines to advise the public that a particular line is high-voltage, thus making the Act so vague as to be unconstitutional. A statute violates due process if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Fisch v. Randall Mill Corp.*, 262 Ga. 861(1) (426 SE2d 883) (1993); *Sliney v. State*, 260 Ga. 167 (391 SE2d 114) (1990). The language of the HVSA is clear and unambiguous in its requirement that notice be given before work is commenced in proximity to high-voltage lines, and in its provision that lack of such notice insulates the owner of the lines from liability. Although persons of common intelligence may not be sure which power lines qualify as "high-voltage lines,"[2] and may have to ask to find out, there is no doubt engendered by the statute about the necessity of giving notice prior to working in proximity to such lines or about the effect of

---

[2] OCGA § 46-3-32(1): "High-voltage lines" means an electric line or lines installed above ground level having a voltage in excess of 750 volts between conductors or from any conductor to ground.

failing to give the notice. Thus, persons of common intelligence need not guess at the meaning of the statute and, once in possession of the necessary facts, should not differ as to its application. We conclude, therefore, that appellants' vagueness attack on the statute is without merit.

* * *

[SEAL] **SUPREME COURT OF GEORGIA**
Case No. S97C1845

Atlanta May 29, 1998

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:
ROY K. PRESTON v. GEORGIA POWER COMPANY et al.

This Court hereby certifies that Petitioner Roy K. Preston raised in this Court, and this Court considered, the issue of whether the immunity provisions of the Georgia High Voltage Safety Act, OCGA 46-3-30 et seq., violate the due process guarantee of the Fourteenth Amendment to the United States Constitution. It was the judgment of this Court that the challenged provisions of the Georgia High Voltage Safety Act do not violate the federal constitutional due process clause. See also *Santana v. Georgia Power Co.*, 269 Ga. 127 (___ SE2d ___) (1998).

All the Justices concur, except Fletcher, P.J., Carley and Hines, JJ., who dissent.

[SEAL]

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I hereby certify that the above is a true extract from The minutes of the Supreme Court of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb, Chief Deputy Clerk

Supreme Court, U.S.
FILED
JUL 28 1998
CLERK

No. 98-36

In The

Supreme Court of the United States

October Term, 1997

ROY K. PRESTON,

Petitioner,

v.

GEORGIA POWER COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF OF RESPONDENT GEORGIA POWER COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

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A. REASONS FOR DENYING THE WRIT

The Petition for Certiorari does not even facially set forth a compelling reason for this Court to review the constitutionality of a statute of the State of Georgia. This case does not involve a decision by a Court of Appeals of the United States. It does not involve a decision on an important federal question in conflict with any decision of another state court of last resort or of a United States Court of Appeals. Nor does it involve an important question of federal law that should be settled by this Court or that conflicts with relevant decisions of this Court. (See U. S. Supreme Court Rule 10.)

All that the Petition claims is that the Georgia High Voltage Safety Act requiring advance notice of work to be done within ten feet of an overhead high voltage line (a line carrying voltage in excess of 750 volts) as a condition precedent to liability of the owner or operator of the line is unconstitutional because it takes away an inchoate interest or right of action and denies him due process since it does not require the utility to notify him of the voltage of the line.

The Act in question (amending the 1960 Georgia High Voltage Act (O.C.G.A. § 46-3-30, et seq.)) became effective July 1, 1992, almost one year before Petitioner was injured. The Act prohibits any work within ten feet of an overhead high voltage line which has not been effectively guarded against danger from accidental contact. Where work must be done within the prohibited distance, advance notice must be given so that the utility can make the line safe before any work proceeds. (O.C.G.A. § 46-3-33).

Where work is done in violation of the Act, the violator shall be strictly liable for any resulting injury or damage. (O.C.G.A. § 46-3-40(b).) Furthermore, if someone violates the Act by working within the prohibited distance without having given notice, the utility is immune from liability for any resulting injury or damage. (O.C.G.A. § 46-3-39(a).) Where notice is given and the utility fails to effect the safeguards specified in the Act within a reasonable time, it shall be liable for the reasonable costs incurred by any such delay. (O.C.G.A. § 46-3-40(c).)

Petitioner was injured while standing on top of a railroad car. A 20 foot long pole he was handling made contact with Respondent's power line which ran parallel to the tracks. At the point of contact, the line was 13 feet 6 inches from the top edge of the car. Finding that no notice of the work was given to Respondent, the Georgia Court of Appeals held that summary judgment was proper.[1]

The Georgia Legislature deemed it proper to attempt to reduce work-place injuries. The Act is a legitimate effort toward that end. Petitioner's effort to avoid the beneficent purposes of the Act should fail.

---

[1] Although the 1992 Amendment to the Act changed a number of provisions to the original 1960 Act, the worker himself, along with his employer, has been a person responsible for the work, and hence one who was required to give notice, since 1974. (Georgia L. 1974, p. 153, § 1.)

B. A STATE LEGISLATURE MAY PROSPECTIVELY ALTER OR ABOLISH TORT LIABILITY

Petitioner first argues that but for the legislative change in the High Voltage Safety Act in 1992, he would have had a tort claim against Respondent for the injuries he received in 1993. He "asks whether due process should not extend to certain interests not yet acquired." (Pet., p. 11.) What he suggests is that neither a state nor Congress should ever be able prospectively to abolish a statutory or common law claim or establish immunities.

Should this argument prevail, a legislative body would never be able prospectively to alter a statute of limitations, create governmental or charitable immunity, pass a Good Samaritan rule, create a recreational use limitation of liability, or even place a cap on punitive damages. Such is not the law nor should it ever be.

Despite dicta which Petitioner says leaves this question open (Pet., p. 11), this Court has left no doubt that its decisions clearly establish that a person has no property, nor vested interest, in any rule of the common law, that the Constitution does not forbid the creation of new rights or the abolition of old ones, and that statutes limiting liability are relatively commonplace. *Duke Power Co. v. Carolina Environmental Study Group, et al.*, 438 U.S. 59, 88 (n.32), 57 L. Ed.2d 595, 98 S. Ct. 2620 (1978).

Even in *Board of Regents v. Roth*, 408 U. S. 564, 573, 33 L. Ed.2d 548, 92 S.Ct. 2701 (1972), cited by Petitioner (Pet., pp. 10-11), this Court held that "procedural protection of property is a safeguard of interests that a person has already acquired in specific benefits." And in *Logan v.*

Zimmerman Brush Co., 455 U.S. 422, 432, 71 L. Ed.2d 265, 102 S.Ct. 1148 (1982), also cited by Petitioner (Pet., p. 12), this Court recognized that "the State remains free to create substantive defenses for use in adjudication – or to eliminate its statutorily created causes of action altogether – just as it can amend or terminate its welfare or employment programs."[2]

The purpose of the High Voltage Safety Act is in part to prevent injury to persons from inadvertent contact with high voltage lines by providing that no work shall be done in the vicinity of such lines until the owner has been notified and has taken specified safety measures. (O.C.G.A. § 46-3-31). Recognizing that a utility cannot constantly patrol its thousands of miles of lines to see if someone is temporarily working near them, the legislature determined to place the duty on those doing the work to let the utility know when and where work activities would be necessary near lines so it could make them safe.[3] Absent such notice, the legislature deemed it fair and appropriate to grant immunity to the utility.

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[2] See also *New York Central Railroad v. White*, 243 US. 188, 198, 61 L. Ed. 667, 37 S.Ct. 247 (1917) ("no person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit"); *Ducharme v. Merrill-National Laboratory*, 574 F.2d 1307, 1309 (5th Cir., 1978) ("a plaintiff has no vested right in any tort claim for damages under state law.")

[3] See, e.g., *Tuscon Electric v. Swengel-Robbins Construction Co.*, 737 P.2d 1385 (Ariz., 1987) (statute represents a determination by the legislature that where work is being performed near power lines, the person or entity performing the work is in the best position to prevent injury by giving notice to the utility so that appropriate protective measures may be taken); *Kimery v. Public Service Co. of Oklahoma*, 622 P.2d 1066

The wisdom of the legislature, of course, is not a concern of the courts. See *State Ports Authority v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947). Moreover, it is axiomatic that every presumption will be made in favor of a statute's constitutionality and it will be voided only when the conflict between it and the fundamental law is clear and palpable. *Davis v. Board of Education of Coffee County*, 203 Ga. 44, 45 S.E.2d 429 (1947). Such is not the case here. The Georgia Legislature was authorized to change the Act prior to the time Petitioner was injured.

C. PETITIONER'S DUE PROCESS CLAIM WAS IRRELEVANT TO THE COURT OF APPEALS' DECISION

Petitioner claims that he was deprived of the opportunity to pursue any tort remedy "because *he* was not informed that the wire around which he worked was a high tension wire." (Pet., p. 9) (Emp. added.) The issue, he says, is "whether due process may require notice of imperceptible facts whose existence demands action in order to protect a potential future claim." (Pet., p. 10).

While recognizing "that the prior decisions of this Court do not go far enough to require notice in this situation" (Pet., p. 10), he cites only dicta from *Logan v. Zimmerman Brush Co.*, supra, for the possibility that due process notice may apply well before a hearing is in the

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(Okla., 1980) (it is far more effective and in the public interest to impose the burden of safety on those working near lines than to require a utility to maintain constant surveillance over all of its lines.)

picture. (Pet., p. 13). He has not cited a single case which supports his claim that due process required the utility to notify him that these lines were, indeed, high voltage.

His argument that the legislature could have required the utility to post signs on all poles that certain of the lines attached to them were high voltage does not mean that such signs would have prevented this accident. Petitioner was working high in the air and about midway between poles. Where should a warning sign have been located? What should it say? What if Petitioner could not read English, or any other language? The list of "what ifs" could go on and on. But three things are certain: (1) Petitioner did not even see the clearly visible wires and hence would not have seen a sign on the adjacent poles. (2) He knew without any warning not to touch any overhead wire with a metal object. (3) His employer knew the wires carried high voltage.

However, this Court need not decide whether the failure to require notice to Petitioner himself that these were high voltage wires somehow amounted to a denial of due process for the reason that this issue was never reached by the Court of Appeals. Said that court:

> We note, however, that the constitutional issue raised by Preston appears irrelevant. Preston's sole constitutional ground asserts that the High-Voltage Safety Act is unreasonable, arbitrary, and capricious because it fails to require the utility to identify which of its lines are high-voltage lines. But a filed and recorded public document in which Ashland granted an electrical power easement to Georgia Power clearly identifies the voltage of the power lines and demonstrates that *Ashland* had actual notice of

> the high voltage. In light of the evidence that Ashland was required to give notice to Georgia Power and was aware of the high voltage carried by the power lines, Preston's lack of knowledge is immaterial to the application of OCGA § 46-3-39(a).

Preston v. Georgia Power Company, 227 Ga. App. 449, 453, 489 S.E.2d 573 (1997).

It is Hornbook law that courts will decide only such questions as are necessary for a determination of the case presented. 21 CJS Courts § 136. Courts deal with cases upon the basis of the facts disclosed and never with nonexistent and assumed circumstances. *The Associated Press v. National Labor Relations Board*, 301 U.S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937). Courts are not roving commissions assigned to pass judgment on the validity of the nation's laws. *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L. Ed.2d 839, 93 S.Ct. 2908 (1973). Inasmuch as Petitioner's due process claim was not essential to the lower court's ruling, it should not be ruled on by this Court.

D. THE FAILURE OF THE ACT TO REQUIRE NOTICE TO PETITIONER OF THE LINE'S VOLTAGE DOES NOT VIOLATE HIS DUE PROCESS RIGHTS

Should the Court determine that procedurally Petitioner's claim is ripe for consideration, substantively it must fail. The trial court's analysis best illustrates why his claim lacks merit. The trial court held:

> Plaintiff asserts that because there is no way for the general public to determine what is and

> is not a high-voltage line, the Act is unconstitutional. However, under Constitutional due process analysis a statute is sufficiently clear if men of common intelligence need not guess at its meaning or differ as to its application. *See, Broadrick v. Oklahoma,* 413 U.S. 601 (1973); *Gouge v. City of Snellville,* 249 Ga. 91, 93 (1982). The High-Voltage Safety Act meets this standard. The Act explicitly defines "high-voltage lines" as any "electric line or lines installed above ground level having a voltage in excess of 750 volts between conductors or from any conductor to ground." O.C.G.A. § 46-3-32(1). Simply because the Act does not impose an affirmative duty on owners or operators to post notice of the voltage does not mean that the general public cannot determine whether an electrical line is "high-voltage."

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Insofar as Respondent is aware, none of the states which have statutes[4] regulating activities around high voltage lines provide that the utility must identify the voltage of the lines. At least one state has considered and rejected Petitioner's argument.

> The language of the statute, however, does not excuse the violator simply because he was unaware of the line's actual voltage. Such a loophole in the statutory scheme would clash with the legislative purpose of promoting the safety of those required to work near potentially deadly high voltage lines.

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[4] These statutes are listed in the Petition at p. 21.

Atwater v. Matanuska Electric Association, 727 P.2d 774, 776 (Alaska, 1986).

The Georgia Supreme Court, in *Santana v. Georgia Power Company*, 269 Ga. 127, ___ S.E.2d ___ (1998) rejected a similar challenge. That court held:

> The language of the HVSA is clear and unambiguous in its requirement that notice be given before work is commenced in proximity to high-voltage lines, and in its provision that lack of such notice insulates the owner of the lines from liability. Although persons of common intelligence may not be sure which power lines qualify as "high voltage lines," and may have to ask to find out, there is no doubt engendered by the statute about the necessity of giving notice prior to working in proximity to such lines or about the effect of failing to give the notice. Thus, persons of common intelligence need not guess at the meaning of the statute and, once in possession of the necessary facts, should not differ as to its application.

Id., at 128-129.

Even if the Act did not impose a notification duty on the Petitioner himself but only on his employer, the result would be the same. Ashland was required to give notice to Respondent and it had full knowledge that this was a high voltage line. Absent notice from anyone, Respondent is entitled to its statutory immunity.[5]

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[5] No one is seeking to prosecute Petitioner for not notifying Georgia Power. No one is seeking to recover from Petitioner damages to the line or on account of an interruption of service. All that Georgia Power argues is that a necessary condition precedent to its liability, i.e., notice, has never occurred.

CONCLUSION

The decision which Petitioner asks this Court to review found it unnecessary to rule on the challenge presented to this Court. Whether under certain circumstances the Act might be held unconstitutional does not make this appeal ripe for review. But even so, Petitioner had no vested interest in requiring the legislature to maintain the status quo. No due process right has been violated. The Petition should be denied.

Respectfully submitted,

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